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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 141.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, JOHN H. BAIRD ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 3, 1877.

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1 *Transcript on appeal.*

In the supreme court of the State of California.

In the district court of the third judicial district in and for the city and county of San Francisco, State of California.

WILLIAM TRENOUTH, PLAINTIFF,
vs.
JOHN H. BAIRD, EXECUTOR OF THE LAST WILL and testament of David W. Connely, deceased; Geo. F. Sharp, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Conne y, widow of John Connely, deceased; Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John H. Baird, } No. 8'.
2 John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley Y. Ludington, C. Bonner, Mrs. Allison Bowers, The City and County of San Francisco, John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, Richard Styles second, defendants.

Complaint.

The plaintiff above named complains of the defendants above named, John H. Baird, executor of the last will and testament of David W. Connely, deceased; Geo. F. Sharp, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, widow of John Connely, deceased; Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John H. Baird, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson,
James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley
3 Y. Luddington, C. Bonner, Mrs. Allison Bowers, The City and County of San Francisco, who are sued by their real names; and of the defendants John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, and Richard Styles second, who, their real names being to plaintiff unknown, are sued by fictitious names, and whose real names, when ascertained, plaintiff prays may be inserted herein in lieu of said fictitious names, and for cause of action avers:

I.

That heretofore, to wit, on the 8th day of March, A. D. 1866, the city

and county of San Francisco was a municipal corporation, formed, established, and existing under and by virtue of the laws of the State of California.

II.

That on the day and year last aforesaid, the United States of America were the owners and holders of the legal title to certain lands in the State of California, and within the corporate limits of said city and county of San Francisco.

III.

That on said day the Congress of the United States passed an act, entitled "An act to quiet the titles to certain lands within the corporate limits of the city of San Francisco," which act was on
4 the same day approved by the President of the United States; that by the provisions of said act all the right and title of the United States to the lands aforesaid were relinquished and granted to the said city of San Francisco, and its successors, upon the following trusts, namely: That all said land should be disposed of and conveyed by said city to parties in the bona fide, actual possession thereof by themselves or tenants, on the passage of said act, in such quantities and upon such terms and conditions as the legislature of the State of California might prescribe, except such parcels thereof as might be reserved and set apart by ordinance of said city for public uses.

IV.

That afterward, to wit, on the 14th day of January, A. D. 1868, for the purpose of carrying out the trusts imposed upon the said city of San Francisco by the aforesaid act of the Congress of the United States, the board of supervisors of the city and county of San Francisco passed an order, entitled "Order No. 800—an order for the settlement and quieting of titles to land in the city and county of San Francisco, situate above high-water mark of the bay of San Francisco and the Pacific Ocean, and without the corporate limits of the city of San Francisco;" that by said order it was among other things ordained:

First. That after the passage of said order, the board of super-
5 visors of said city should proceed to devise and adopt a plan for the subdivision into blocks and lots of the land hereinbefore mentioned, and to select and set apart for public uses such lots and portions of said land as said board might deem necessary, subject to the limitations and provisions of said order hereinafter mentioned.

Secondly. That after the adoption of the plan hereinbefore mentioned, said board should cause to be made a map of said land according to said plan; that said map should show the streets and public highways, the blocks formed by the intersection of the streets and public highways, and the lots into which said blocks should be subdivided, and upon such map should be designated the lots and portions of land set apart for public uses and the particular use for which each lot or portion of land should have been set apart.

Thirdly. That upon the completion of the map hereinbefore mentioned, it should be deposited for public inspection in the office of the clerk of the board of supervisors, and there remain for a period of thirty days; and notice should be published in three of the daily papers during the whole time that said map should remain in said office.

Fourthly. That any person having or claiming any portion of said land under and by virtue of the provisions of said order might, at any time before the completion of said map, or while the same might remain in the office of the clerk of the board of supervisors for public inspection, present to the committee on outside lands, hereinafter mentioned, a description and diagram of the lands in which he should so claim an interest, and have the same delineated on said map; but that no claim should be delineated on said map by said committee unless all taxes should have been paid thereon for five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six.

6

Fifthly. That after said map should have remained in the office of the board of supervisors for the said period of thirty days, as provided in said order, the board of supervisors might examine the objections, if any were made thereto, and might make such alterations in the location or designation of any lots or portions of land set apart for public uses as might be necessary to obviate any objections which the said board should deem just and proper.

Sixthly. That as soon as the alterations hereinbefore mentioned should have been made and delineated on said map, the said map should become and be the official map of said lands, and the portions of land therein designated as public streets and highways, and the tracts or portions of land set apart and designated on said map as a public park, and the tract or portion of land set apart and designated thereon as a cemetery, and lots for a hospital, city library, or other public purpose, should be deemed absolutely dedicated as such.

Seventhly. That no person should be entitled to receive compensation for any lot or portion of land set apart for public use, unless his claim should have been delineated on the map hereinbefore mentioned, nor until all conflicting claims to such lot or portion of land should have been finally determined, and no person should be entitled to receive compensation for any portion of land indicated in any street or highway.

7

Eighthly. That after the committee hereinafter mentioned should have made their final report upon the said map and reservations, and the report should be ratified by the board of supervisors, it should be the further duty of the said committee to make a just appraisement of the lands reserved for public uses other than for streets and highways, and to make a just and equitable assessment of the value of the lands so reserved, ratably and equitably upon and to each piece and parcel of land delineated in said map according to the appraised value of said lands (exclusive of the lands reserved for public streets and highways).

Ninthly. That upon the payment to the county treasurer of the city and county of San Francisco of the amount assessed by the committee provided for in said order, the city and county of San Francisco should relinquish and grant, and by said order said city and county of San Francisco did relinquish and grant, all the right, title, and claim which the said city and county had at the time of the passage of said order, as the grantee of the United States, in and to the lands hereinabove mentioned, and not excepted or reserved, or intended to be excepted or reserved by the provisions of said order, and which might not be set apart for public use under any of the provisions of said order, and upon which should be paid previous to the first day of April, eighteen hundred and sixty-eight, all taxes which had been assessed thereon during the five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six, unto the person, or to the heirs and assigns of persons who were on the eighth day of March, eighteen hun-

8

dred and sixty-six, in the actual, bona fide possession thereof by themselves or their tenants; that it was the intent and object of said order to pass the right, title, and claim of said city and county in and to every tract or portion of said land delineated on said map, except the portions that were or might be reserved as aforesaid, possessed by one person, unto the possessor thereof in severalty.

Tenthly. That a committee of five members of the board of supervisors should be chosen by said board, whose duty it should be to prepare and report to the board the plan provided for in said order, to supervise the making of the map provided for in said order, to select, set apart, and designate the lots and portions of land provided for in said order to be set apart for public use, and generally to superintend the carrying out of the provisions of said order.

Eleventhly. That the board of supervisors should provide by order for the distribution and payment to those entitled thereto of the
9 moneys assessed for the cost of reservations, and which should have been paid to the city and county treasurer under the provisions of said order.

V.

That afterwards, to wit, on the 27th day of March, A. D. 1868, by an act entitled "An act to confirm a certain order passed by the board of supervisors of the city and county of San Francisco," passed and approved on that day, the legislature of California ratified and confirmed the order aforesaid and all acts which then had or might thereafter take place under its provisions.

VI.

That afterwards, to wit, on the 14th day of March, A. D. 1870, the legislature of California passed an act entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," which act was on the same day approved by the governor of said State; that by said act it was, among other things, enacted:

First. That upon receiving a petition from any person or persons claiming that they by themselves, their tenants, or the persons through whom they claim or derive possession, had been from and including the eighth day of March, Anno Domini eighteen hundred and sixty-
10 six, and still were in the possession of any of the lands described in the act of the Congress of the United States in this complaint hereinbefore mentioned, and that they or the persons through whom they claim or derive possession have paid to the tax collector of the city and county of San Francisco the amount assessed by the outside land committee upon the land described in said petition to pay for lands reserved for public use, as provided for in the order of the board of supervisors hereinbefore referred to, and also paid all taxes on said land for the five fiscal years preceding the year beginning July 1, 1866, and all taxes levied on said lands for State and municipal purposes at the date of the said act of the legislature due and remaining unpaid; and that such lands have not been sold, leased, dedicated, reserved, or conveyed by authority of the said city and county of San Francisco, or the United States, to any one, or for any purpose, and asking for a grant from said city and county, the board of supervisors should proceed to act thereon as hereinafter specified; that the said petition should be verified by the oath or

affirmation of the party in whose behalf the petition is presented, or by some one acting as his agent and conversant with the facts detailed in the petition.

Secondly. That all petitions hereinbefore mentioned should be referred to the committee on outside lands; that the party presenting said petition might appear before the clerk of said board and make proof,
11 verbal and documentary, of the matters alleged in his petition; that the proofs of the petitioner being noted, the said committee should proceed to consider the same, and should make such report and recommendation thereon as to them should seem just and proper in the premises; that if in the judgment of the board of supervisors the claim of the petitioner were well founded, they should adjudge and award a grant of such land to the petitioner or petitioners therefor, less the amount reserved for public use.

Thirdly. That the mayor of the city and county of San Francisco should thereupon execute, acknowledge, and deliver to the party or parties presenting the aforesaid petition a deed of conveyance of the tract or lot of land as aforesaid adjudged and awarded to the petitioner, and attach thereto the corporate seal of the city and county of San Francisco.

Fourthly. That a conveyance executed and delivered in pursuance of the provisions of said act should operate as an acknowledgment on the part of the said city and county that the title to the land therein described had passed under and by virtue of the said order number eight hundred, hereinabove mentioned, and also under and by virtue of the several acts of Congress and the legislature, ratifying said orders, or under authority of which the same have been passed; and that such conveyance should likewise operate to grant, convey, remise, and release to the party, his heirs and assigns named therein, the lands
12 in such conveyance described, and all the estate and interest, present and future, of the said city and county of San Francisco in and to such lands.

VII.

That on the 8th day of March, 1866, one Daniel Sweeney was in the bona fide actual possession of that portion of the lands hereinbefore mentioned as granted by the Congress of the United States of America as aforesaid to the city and county of San Francisco, which is described in Exhibit A, hereunto attached and made part of this complaint; that said premises had been and were vacant and unoccupied from the time of the cession of the State of California to the United States until the 11th day of April, A. D. 1863; that on the day last aforesaid the said Daniel Sweeney was a citizen of the United States, over twenty-one years of age, the head of a family, and entitled to all the benefits of the pre-emption laws of the United States; that on the said day the said Sweeney, being desirous of availing himself of the benefits of said pre-emption laws, went upon the premises aforesaid, enclosed them with a substantial fence, and built a dwelling-house upon the same; that after having taken possession of said premises as aforesaid, said Sweeney continued to occupy and reside upon the same; that upon the 14th day of May, 1863, said Sweeney duly filed his pre-emption claim to said premises in the United States land office at San Francisco;
13 that in the fall of said year 1863, the said Sweeney cultivated said premises and used them for the pasturage of cattle, and so continued to cultivate and use the same until the year 1869; that said

Sweeney, together with his family, has continuously and uninterruptedly occupied and resided upon said premises from the fall of 1863 until the spring of 1869, when he was ejected from the same, making the same his home and that of his family, claiming the same in good faith as his property, and enjoying the sole, exclusive, and peaceable possession thereof.

VIII.

That previous to the first day of April, 1868, all taxes which had been assessed upon said land during the five fiscal years preceding the year beginning July 1st, eighteen hundred and sixty-six, were paid.

IX.

That the amount assessed upon said land by the committee designated as the "Outside Land Company," provided for in the order of the board of supervisors hereinbefore referred to, were paid to the county treasurer of the city and county of San Francisco prior to the 14th day of March, 1870.

X.

That afterwards, to wit, on the day of April, 1870, one
14 David W. Connely presented to the board of supervisors of the city and county of San Francisco his petition in writing, wherein he, among other things, sets forth that he was, on the date of said petition, in possession of the tract of land last hereinbefore referred to and described in Exhibit A, hereunto attached, and asking for a grant of said lands from said city and county to himself; that said petition did not set forth that said Connely, either by himself, his tenants, or the person through whom he claimed or derived possession, was in possession of said land, or any part thereof, on the 8th day of March, 1866.

XI.

That in truth and in fact the said David W. Connely was not, nor was any person or persons through whom he claimed or derived possession, in possession of the premises in said petition described, nor any part or parcel thereof, on the 8th day of March, A. D. 1866, or at any time previous to the spring of 1869.

XII.

That after the presentation of said petition, the said David W. Connelly appeared before the clerk of said Outside Land Committee and introduced evidence tending to prove that he was in possession of said premises at the time of the presentation of said petition, but said Connely did not offer or introduce any evidence to show that he, or
15 the person or persons through whom he claimed or derived possession, were on the 8th day of March, A. D. 1866, in the possession of the land described in said petition or any part thereof.

XIII.

That the said Daniel Sweeney did not present his petition to the

board of supervisors under the provisions of the act last aforesaid, because said Sweeney was not at the date of the passage of the said act, nor at any time thereafter, in possession of said land, and said Sweeney could not have verified by oath a petition setting forth that he was so in possession.

XIV.

That the board of supervisors of said city and county of San Francisco, upon the petition and evidence aforesaid, did adjudge and award a grant of said lands, described in said petition, to the said David W. Connelly, and the mayor of the said city and county of San Francisco, in the year eighteen hundred and seventy, did execute, acknowledge and deliver to the said David W. Connely deeds of conveyance of the tract of land described in the petition aforesaid, and did attach thereto the corporate seal of the said city and county of San Francisco; that the said David W. Connelly did, before the presentation of the petition aforesaid, pay to the tax collector of the city of and county of San Francisco the amount assessed by the Outside Land Committee upon
16 the premises aforesaid, to pay for land reserved for public use, provided for in section 10 of order eight hundred, hereinbefore referred to, and also paid all taxes on said land for the five fiscal years preceding the year beginning July 1st, 1866, and all the taxes levied on said lands for State and municipal purposes due and remaining unpaid at the date of said petition. But plaintiff avers that said payment was made in fraud of the rights of said Sweeney, and to prevent him from making the same; that said Sweeney was ready and willing, and offered to make said payments, but the officers to whom they were by law to be made would not accept the same; that a portion, to wit, about twenty acres of the premises hereinbefore referred to, and described in Exhibit A, hereto annexed, were duly reserved by the city of San Francisco for public use, by authority of the act of Congress of March 8, 1866, hereinbefore referred to, and pursuant to the provisions of order number 800, approved and ratified by act of the legislature of the State of California, passed March 27th, 1868, hereinbefore referred to; that pursuant to the act last aforesaid, and the order and regulations of the board of supervisors, the city and county of San Francisco did, on the day of , 1870, pay to said David W. Connely the sum of $20,000 as compensation for the land thus reserved for public use; that said last named sum is greater than the aggregate amount of taxes and assessments paid by said Connely, as aforesaid.

17 XV.

That afterwards, to wit, on the 6th day of April, 1871, the said David W. Connely conveyed to one George F. Sharp a portion of the land thus conveyed to said Connely by the city and county of San Francisco, as aforesaid.

XVI.

That afterwards, to wit, on the day of January, 1872, the said David W. Connely departed this life, leaving a will; that on the 23d day of February, A. D. 1872, said will was duly admitted to probate in the probate court of the city and county of San Francisco; that by said will the defendant, John H. Baird, and one John S. Hager were named as the

executors of said last will and testament, and all the estate of said decedent was devised to said executors upon certain trusts therein mentioned; that on the 23d day of February, 1872, the said Hager resigned his trust as such executor; that letters testamentary upon the estate of said Connely were on the 26th day of February, 1872, duly issued to said Baird as sole executor by the probate court aforesaid; that by said last will and testament the said David W. Connely bequeathed all his real estate to his executors aforesaid; that the defendants, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines,
18 Cynthia Ann Connely (widow of John Connely, deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton and Samuel C. Stratton, claim some right or title in the estate of the said David W. Connely, deceased, as devisees, legatees, or cestuis que trustant, under the aforesaid will of said D. W. Connely, the exact nature and extent of which claims of said defendants is to plaintiff unknown.

XVII.

That the defendants, John H. Baird, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley Y. Luddington, C. Bonner, Mrs. Allison Bowers, the City and County of San Francisco, John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, Richard Styles second, are in and detain from this plaintiff the possession of said premises, and claim some right or interest in the premises aforesaid, derived from and under the said D. W. Connely; that the exact nature or extent of said claim plaintiff does not know and is unable to ascertain, but said plaintiff avers that said interest or claim of said defendants was acquired by them with full notice and knowledge of the facts hereinbefore in this complaint set forth, and of the rights of the plaintiff and those under whom
19 he claims and derives title to said premises, and that said title so acquired by said defendants is subject in their hands to the same trusts and equities with which it was charged while it vested in the said David W. Connely; that this plaintiff is informed and believes, and so the fact is, that under the act of Congress of the United States, hereinbefore referred to, the city of San Francisco acquired the legal title to the lands hereinbefore referred to as being described in Exhibit A, hereto annexed, in trust for the aforesaid Daniel Sweeney, who was in the bona fide actual possession thereof on the passage of said act; that by virtue of the order of the board of supervisors, hereinbefore referred to, and the act of the legislature of the State of California ratifying and confirming the same, all the right, title, and claim of the said city as the grantee, under said act of Congress, in and to said lands, vested in this plaintiff, upon the payment to the county treasurer of the city and county of San Francisco of the amount assessed by the committee provided for in said order of said board, and the payment previous to the first day of April, 1868, of all taxes which had been assessed upon said lands during the five fiscal years preceding the year beginning July 1st, eighteen hundred and sixty-six; that as the beneficiary under said act of Congress, and the holder of the title of said city of San Francisco, by virtue of the order of the board of supervisors, hereinbefore referred to, and the act of
20 the legislature of California ratifying and confirming the same,

said Daniel Sweeney was entitled to receive from said city the deed of conveyance provided for in the act of the legislature of California, approved March 14, 1870, hereinbefore referred to. But now so it is, may it please the court, that the said David W. Connely, contriving to wrong and defraud the said Daniel Sweeney, by the false pretences, allegations and proofs hereinbefore set forth, did, in his own name and unto himself, and for his own benefit, obtain a conveyance from said city for the lands hereinbefore referred to and described in Exhibit A.

XVIII.

That this plaintiff, William Trenouth, through various mesne conveyances, did, before the commencement of this action, acquire and now holds all the right, title and interest and claim owned or held by the said Daniel Sweeney, in and to the lands aforesaid, on the 8th day of March, 1866, and from thence hitherto.

XIX.

Wherefore the plaintiff prays that the said John H. Baird, executor of the last will and testament of David W. Connely, as aforesaid, be decreed to hold whatever title he may have acquired to the lands aforesaid by or through the aforesaid conveyance made by the city of San Francisco to his testator, in trust for this plaintiff, and that said
21 Baird be enjoined from transferring or parting with said title, and that he be decreed to convey the same by proper deed to this plaintiff, and that said plaintiff be declared the owner of said land, and that said defendant be decreed to have no rights therein as against this plaintiff, and that said plaintiff recover the possession of said premises from said defendants, and for such other and further relief, including costs, as to the court may seem meet and proper.

J. P. HOGE AND
D. M. DELMAS,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

William Trenouth, being duly sworn, deposes and says that he is the plaintiff in the above entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

WILLIAM TRENOUTH.

Subscribed and sworn to before me this 23d day of May, 1872.
[NOTARIAL SEAL.] JAS. H. BLOOD,
Notary Public.

EXHIBIT A.

All that certain piece, parcel, or tract of land described as follows,
22 to wit: Commencing in the line of the north fence enclosing the tract at a point 8.35 chains north of the northwest corner of section 18, township 2 south, range 5 west, and running along said fence east 27.76 chains to the northeast corner; thence along the east-line fence south 30.80 chains to an angle; thence south 5¼° west 9.80 chains to an an-

gle; thence south 45¼° west 7.50 chains to an angle; thence north 85° west 4.80 chains to an angle; thence north 89° west 24 chains to the west-line fence of the tract; thence north 45 chains to the northwest corner of the tract; thence east 8 chains to the point of beginning; containing 160 acres, more or less.

(Endorsed:) Filed July 24, 1872. Wm. Harney, clerk, by J. L. Lee, dep. clerk. J. P. Hoge and D. M. Delmas, attorneys for plaintiff.

Answer.

Title of court and cause.

The city and county of San Francisco, one of the defendants in the above entitled action, comes into court and makes answer to the complaint herein.

I.

Denies, according to information and belief, that one Daniel
23 Sweeney was in the bona fide actual possession of that portion of the lands in said complaint mentioned, as granted by the Congress of the United States of America to the city and county of San Francisco, which is described in Exhibit A attached to said complaint, or of any part thereof, on the 8th day of March, 1866, or at any other time.

Denies, according to information and belief, that said premises, or any part thereof, had been, or that they, or any part thereof, were vacant or unoccupied from the time of the cession of the State of California to the United States, the 11th day of April, A. D. 1863, or during any part of that time, or at all; or that on the day last aforesaid, or at any other time, said Daniel Sweeney was entitled to the benefits of the pre-emption laws of the United States, or that on the said day, or at any other time, the said Sweeney, being desirous of availing himself of the benefits of said pre-emption laws, or otherwise, went upon the premises aforesaid, or upon any part thereof, or enclosed them, or any part thereof, with a substantial fence, or with any fence, or built a dwelling-house upon the same, or that after having taken possession of said premises, or at all, as mentioned in said complaint, or otherwise, said Sweeney continued to occupy the same or to reside upon the same, or any part thereof; or that upon the 14th day of May, 1863, or at any other time, said Sweeney duly filed his pre-emption claim to said premises in the United States
24 land office at San Francisco; or that in the fall of the year 1863, or at any other time, the said Sweeney cultivated said premises, or any part thereof, or used them, or any part thereof, for the pasturage of cattle, or that he so continued to cultivate or use the same until the year 1869, or for any period of time; or that said Sweeney, either alone or together with his family, has continuously or uninterruptedly occupied or resided upon said premises, or any part thereof, from the fall of 1863 until the spring of 1869, or at all, or for any period, or that he was then or ever ejected from the same or from any part thereof; or that during said period of time, or during any period or at any time, said Sweeney made the same, or any part thereof, his home, or the home of his family; or that at that time or during said period, or at any time, or at all, said Sweeney claimed the same, or any part thereof, in good faith, as his property, or enjoyed the sole or exclusive or peaceable possession thereof, or of any part thereof.

II.

Denies, according to information and belief, that the petition presented by David W. Connely, mentioned in said complaint, did not set forth that said Connely, either by himself, his tenants, or the person through whom he claimed or derived possession, was in the possession of said land, or any part thereof, on the 8th day of March, 1866.

III.

25 Denies, according to information and belief, that said David W. Connely was not, nor was any person or persons through whom he claimed or derived possession, in possession of the premises in said petition of said David W. Connely described, nor any part or parcel thereof, on the 8th day of March, 1866, or at any time previous to the spring of 1869, but on the contrary thereof alleges, according to information and belief, that said David W. Connely, and those persons through whom he claimed and delivered possession of said premises, were in possession of the whole of said premises on the 8th day of March, 1866, and for fifteen years and upwards previous thereto.

IV.

Denies, according to information and belief, that said Connely did not offer or introduce any evidence to show that he, or the person or persons through whom he claimed or derived possession, were, on the 8th day of March, 1866, in the possession of the land described in said petition, or any part thereof, and, on the contrary thereof, alleges, according to information and belief, that said Connely did introduce evidence to show that he and the persons through whom he claimed and derived possession, were in the possession of said land on the day last aforesaid.

V.

Denies, according to information and belief, that said payment by said David W. Connely of taxes and outside land tax, or either,
26 or of any part thereof, was made in fraud of the rights of said Sweeney, or to prevent him from making the same, or that said Sweeney was ready or willing, or offered to make said payments, or any of them, or that the officers, or any of them, to whom they were by law to be made, would not accept the same.

VI.

Denies that the interest or the claim of this defendant, "the city and county of San Francisco," in the premises described in said complaint, was acquired by the defendant last aforesaid, with full or any knowledge of the facts set forth in said complaint, or of any rights of the plaintiff or of those under whom he claims or derives title to said premises, and denies that any title whatever acquired by the defendant last aforesaid in the premises described in said complaint is subject in its hands to any trusts or equities mentioned in said complaint, or to any trusts whatever, except to hold the same to the public use of the people of the city and county of San Francisco, and of the people of the State of California, or to any equities whatever, or to any

trusts or equities with which it was charged while it vested in the said David W. Connely.

Denies that under the act of Congress of the United States, referred to in said complaint, the city of San Francisco acquired the legal title to the lands referred to in said complaint, as being described in
27 Exhibit A attached to said complaint, in trust for the aforesaid Daniel Sweeney, or that said Sweeney was in the bona fide actual possession thereof on the passage of said act.

Denies, according to information and belief, that by virtue of the order of the board of supervisors referred to in said complaint, and the act of the legislature of the State of California ratifying and confirming the same, or by virtue of any facts whatsoever, all the right, title, and claim, or any right, title or claim of the said city, as granted under said act of Congress, in and to said lands, or any part thereof, vested in said plaintiff, upon the payment to the county treasurer of the city and county of San Francisco of the amount assessed by the committee, provided for in said order of said board, and the payment previous to the 1st day of April, 1868, of all taxes which had been assessed upon said lands during the five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six.

Denies, according to information and belief, that as beneficiary under said act of Congress, and the holder of the title of said city of San Francisco, by virtue of the order of the board of supervisors referred to in said complaint, and the act of the legislature of California ratifying and confirming the same, or otherwise, said Daniel Sweeney was entitled to receive from said city the deed of conveyance provided for in the act of the legislature of California, approved March 14, 1870, referred to in said complaint.

28 Denies, according to information and belief, that said David W. Connely contrived to wrong or to defraud the said Daniel Sweeney, or that he did wrong or defraud the said Daniel Sweeney by the false pretences, allegations, and proofs set forth in said complaint, or that said David W. Connely was guilty of the false pretences, or of the other wrongs set forth in said complaint, or of any of them, or that by reason of any wrong, fraud, and false pretences, or either, the said David W. Connely obtained the conveyance from the city, mentioned in said complaint.

This defendant, the city and county of San Francisco, alleges that all of that portion of the premises described in plaintiff's Exhibit A, attached to said complaint, and which was reserved for public use, as alleged in said complaint, is lawfully controlled by and in the possession of the said city and county of San Francisco, and so was at the time of the commencement of this cause, and ever since has been, and dedicated to public use, pursuant to the act of Congress, order of the board of supervisors, and act of the legislature confirming and ratifying said order mentioned in said complaint, and pursuant to proceedings duly had in that behalf in the said board of supervisors.

VII.

Denies, according to information and belief, that the said plain-
29 tiff William Trenouth, through various or any mesne conveyances, did, before the commencement of this action, acquire or that he now holds all or any part of the right, title or interest, or claim owned or held by the said Daniel Sweeney, in and to said lands or any part thereof, on the 8th day of March, 1866, or from thence hitherto, or for any period of time, or at any time, or at all.

Wherefore this defendant, the city and county of San Francisco, asks that the prayer of said complaint be denied.

W. C. BURNETT,
Attorney for said Defendant, the City and County of San Francisco.

STATE OF CALIFORNIA,
City and County of San Francisco, ss :

William Alvord, being duly sworn, deposes and says that he is the mayor of the city and county of San Francisco, the defendant answering hereby, and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes the same to be true.

WILLIAM ALVORD.

Subscribed and sworn to before me this 12th day of August, A. D. 1872.

JAS. E. ASHCOM,
Dep. Co. Clerk.

30 (Endorsed :)

Due service of the within, by true copy thereof, is hereby admitted to have been made this 12th day of August, A. D. 1872.

J. P. HOGE,
Plff's Atty.
W. C. BURNETT,
Attorney for the City and County of San Francisco.

Filed August 12, 1872.

WM. HARNEY, *Clerk*,
By C. M. BOYD, *Deputy.*

Answer.

(Title of court and cause.)

The defendants, John H. Baird and John H. Baird, executor of the last will and testament of David W. Connely, deceased, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely (widow of John Connely, deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, William Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, come and jointly and severally answer the complaint of the plaintiff, by their attorney S. M. Wilson, and for answer aver as follows :

I.

31 The defendants admit and aver that on the 8th day of March, A. D. 1866, the city and county of San Francisco was a municipal corporation formed, established and existing under the laws of the State of California ; that is to say, an act of the legislature of the said State, entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, to consolidate the government thereof," passed April 19th, 1856 ; and

has ever since continued to be, and still is, such municipal corporation, and was and is the successor in all respects of the former city of San Francisco, and that the latter was a municipal corporation under and by virtue of the act of the legislature of said State, entitled "An act to re-incorporate the city of San Francisco," passed April 15th, 1851, both of which acts are expressly referred to and made part of this answer; and that said city was the successor in interest and estate of the pueblo or town which existed under the laws and regulations of the Mexican government at the time of the cession of the territory now composing the State of California by said Mexican government to the United States of America.

II.

And the defendants admit and aver that on the 8th day of March, 1866, the said United States were the owners and holders of the legal title to certain lands in said State and within the corporate limits
32 of said city and county, and that there were and are certain other lands in said corporate limits which were at the time of said cession by Mexico to the United States held, owned and claimed by said pueblo as pueblo lands, under said laws and regulations of Mexico, and which passed to said city of San Francisco as the successor of said pueblo, and thence to the said city and county.

III.

And the said defendants admit that the said act of Congress was passed and approved on said 8th day of March, 1866, and the same is expressly referred to.

IV AND V.

And the said defendants admit and aver that on January 14th, 1868, the order No. 800, referred to in the complaint, was passed and that the same was ratified and confirmed by said act of the legislature, entitled "An act to confirm a certain order passed by the board of supervisors of the city and county of San Francisco," passed March 27th, 1868, which act and order therein set forth are expressly referred to and made part of this answer.

And the defendants aver that said order was further ratified and modified by the act of the legislature of this State, entitled "An act further to provide for the ratification and confirmation of a certain order passed by the board of supervisors of the city and county of San Fran-
33 cisco, and to modify certain provisions of the same," passed March 27th, 1868, which is also referred to and made part hereof.

VI.

And defendants admit and aver that on the 14th day of March, A. D. 1870, the legislature of this State passed the act entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," which act is here expressly referred to and made part hereof.

VII.

And the defendants deny that the said Daniel Sweeney was, on the 8th day of March, 1866, or at any other time, in the bona fide actual possession, or in any possession at all, except as hereinafter shown, of the said tract of land described in said Exhibit A annexed to the complaint, or any part of said lands; and deny that said land or any part thereof had been or was vacant or unoccupied from the time of the cession of the State of California to the United States until the 11th day of April, 1863; and deny, on their information and belief, that the same or any part thereof was vacant or unoccupied at any time after the 25th day of April, 1854; on the contrary, defendants aver, on information and belief, that said lands were, at all times from said last-named day
34 down to the time of the trespasses and ouster hereinafter shown, occupied and actually possessed and enjoyed by the defendants and their grantors and those under whom they claim, and their tenants and the tenants of their grantors; and that in or about the month of May, 1863, the defendants, John H. Baird, John S. Hager, Eugene L. Sullivan, together with their tenants in common, Charles K. Smith, Isaac R. Roberts, and William C. Walker, were in the bona fide actual possession of said lands, claiming the same in their own right and adversely to all others, and that whilst so possessed, viz, the said Daniel Sweeney, together with Charles P. Duane, William G. Ross, and John A. Kelly, and their workmen, on their behalf, at the time last aforesaid, wrongfully and unlawfully entered into and upon said possession, and wrongfully and unlawfully ejected and ousted the said Baird, Hager, Smith, Sullivan, Roberts, and Walker from the said lands, and wrongfully withheld them from the said last named persons until as hereinafter shown, well knowing the rights and title of said persons to said lands, and which entry, trespass, and ouster were each and all made by said Sweeney, Duane, Ross, and Kelly, by conspiracy and combination and in bad faith and with intent to cheat and defraud the said Baird, Hager, Smith, Sullivan, Roberts, and Walker out of their said lands and possessions, and with intent to hold and retain said lands by force, arms and violence, fraud and perjury.

35 And the defendants aver that afterwards, to wit, on the 11th day of September, 1865, the said last-named persons commenced an action against said Sweeney, Duane, Ross, Kelly, Patrick H. Owens, and Frederick Hood, Daniel Harvey, Daniel Donaldson, John Doe, and Richard Roe, in the district court of the fourth judicial district of the State of California, in the city and county of San Francisco, to recover the possession of said land, together with damages for the detention and costs of suit; and in said action the plaintiffs therein averred that on the 1st day of January, 1863, and prior thereto, they were the owners and lawfully possessed of said tract and parcel of land, and that whilst so possessed, afterwards and on the 11th day of May, 1863, the defendants in said action wrongfully and unlawfully entered into and upon the possession of said tract and parcel of land, and wrongfully and unlawfully ejected and ousted the plaintiffs therefrom, and had ever since unlawfully kept the plaintiff out of the possession of the same; and the said Sweeney, Duane, Ross, and Kelly filed their answers in said action in due course of proceeding, and denied the said averments in said complaint in said action against them; and said Sweeney, in his said answer, set up and averred that the said Duane then was, and at the several times in the complaint mentioned had been, lawfully possessed in fee simple of the title to said property and every part thereof,

and that the other defendants in said action were then in possession, holding under said Duane and the said defendant Sweeney, by agreement to purchase from said Duane.

And the defendants further aver that afterwards, to wit, on the 24th day of November, 1866, the said Charles K. Smith, one of the plaintiffs in said action, and William G. Ross, one of the defendants therein, having theretofore died pending said action, the said district court, after due proceedings for that purpose made, ordered that said action should be continued by said Benjamin Smith, as executor of said Charles K. Smith, deceased, as one of the plaintiffs, and against Mary Esther Ross, as executrix of William G. Ross, deceased, as one of the defendants. And defendants aver that said William G. Ross and Charles K. Smith had respectively died prior to said order of said court, each leaving his last will and testament, and that the same were each duly admitted to probate in the probate court of the city and county of San Francisco, and letters testamentary thereon issued respectively to said Benjamin Smith and said Mary Esther Ross, and that they respectively and duly qualified as such, and entered upon the duties of said respective trusts; and that said orders and judgments of said probate court were each and all duly given and made; and that said Mary E. Ross, as such executrix, after the making of said order of said district court, appeared in said case by her attorneys, and joined issue with the said plaintiffs therein.

And the defendants aver that afterwards, to wit, on the 13th day of February, 1867, said action came on for trial in regular order on the calendar of said fourth district court, and it appearing that the defendants Fredrick Hood, Daniel Harvey, Daniel Donaldson, John Doe, and Richard Roe had not been served with summons, and had never been in possession of said premises, was ordered by the court that said action as to said Hood, Harvey, Doe, Roe, and Donaldson, should be dismissed; and thereupon a full and fair trial was had in said district court between said plaintiffs in said action and said remaining defendants, including said Daniel Sweeney, upon the merits of the respective rights of said plaintiffs and defendants in and to said lands; and upon said trial it was, on the 6th day of April, 1867, in and by the judgment of said district court, ordered and adjudged that the said plaintiffs therein, John H. Baird, John S. Hager, Eugene L. Sullivan, Isaac R. Roberts, William C. Walker, and Benjamin Smith, executor of the last will and testament of Charles K. Smith, deceased, should have and recover the possession of the said lands and premises described in said complaint (which were the same lands described and referred to in the complaint in this action) of and from the said defendants Charles P. Duane, John A. Kelly, Daniel Sweeney, and Mary E. Ross, executrix of the last will and testament of William G. Ross, deceased. And it was further ordered and adjudged therein that the said plaintiffs should have and recover of said defendants Duane, Sweeney, Kelly, and Ross, executrix of Ross (to be paid by her in due course of administration), the costs and disbursements of said plaintiffs sustained, amounting to thirteen hundred and sixty-five dollars; all of which will more fully appear by the said record of said district court, and which judgment has been in nowise vacated, set aside, or reversed, but remains in full force and effect.

And the defendants herein aver that afterwards the said cause was carried by said defendants in that action, upon appeal, to the supreme court of this State; and that afterwards, and at or about the April term, 1869, of said supreme court the said judgment of the said district court

was duly affirmed by the judgment of said supreme court, which latter judgment remains in full force and effect, and in nowise set aside, vacated, or set down for rehearing.

And defendants aver that afterwards, to wit, on the 2d day of September, 1869, the remittitur of said supreme court, duly issued on said judgment of affirmance, was filed in said district court, and the due and proper orders made thereon, and that shortly thereafter, in pursuance of said judgment of said district court, the writ of said court was duly issued for that purpose, and by virtue thereof the sheriff of said city and county duly ejected said defendants in said action from said land and premises, and placed the said plaintiffs therein in actual pos-
39 session, and they, together with those claiming under them, have ever since held and do now hold actual possession thereof, claiming the same for themselves and in their own right.

And defendants aver that the said ejectment of said Sweeney, alleged in the complaint herein to have occurred in the spring of 1869, in the same ejectment made by said sheriff as aforesaid.

And the defendants aver that by reason of said judgments of said district court and said proceedings, the said Sweeney and his said grantee, the plaintiff herein, are both and each estopped to set up and aver the said matters and things set up in said complaint, or to claim said lands by reason of his said trespasses upon said defendants, and these defendants rely on said estoppel.

And the defendants deny that said Sweeney ever took possession of said lands or any part thereof, except in conjunction with his fellow-wrongdoers, said Duane, Ross, and Kelly, and in bad faith and under said combination and conspiracy between them to cheat and defraud the defendants, and deny that he enclosed the said land or any part thereof with a substantial fence, but that the same had been previously enclosed by such a fence by defendants and their grantors, which was at the time of said trespasses standing in good condition in almost its entirety, and that the said Sweeney and his said fellow-wrongdoers took the said fences of the defendants and a house standing on said land and
40 erected by the grantors of the defendants, and used and appropriated them to their own uses.

And defendants deny that said Sweeney was desirous of availing himself of the benefits of the pre-emption laws, or that for such purpose he went upon said lands, or erected a fence or built a house thereon, but that all his acts and doings on said land were in conjunction with his said co-conspirators, and for the joint benefit of all.

And defendants deny that said Sweeney ever had any separate or exclusive possession of said lands or any part thereof, but occupied a part thereof only, and that he held for said his fellow-wrongdoers, and that they, one or more, occupied other parts of said land, but all for the common purpose of defrauding the defendants.

And defendants admit that said Sweeney, for the purpose of aiding in said conspiracy and wrong, took some proceedings in said United States land office on or about the 14th May, 1863, but deny that he duly filed his pre-emption claim to said premises, and deny, on information and belief, that his said paper had any force or effect whatever, and aver that said lands were not open to such claims, but were exempted by law and the authority of the United States Government from pre-emption claims.

And defendants admit and aver that in the fall of 1863, after said Sweeney, Duane, Kelly, and Ross had so wrongfully entered and

trespassed upon the actual possession of said defendants, and
41 wrongfully ousted them from said lands, the said Sweeney, acting in conjunction with his said co-trespassers, cultivated a very small patch (and no more) of said land, and let a cow and a horse run upon the same to pasture, all of which was done to exclude defendants therefrom, and give a color to said wrongful possession; that during the entire time said Sweeney, Duane, Kelly, and Ross held said lands by their said trespass they did not, nor did any of them, cultivate the one one-hundredth part thereof, or pasture thereon more than one or two cows, or a horse or two, for a short time, and that they failed to use or subject said lands to any useful or beneficial purpose, and only so possessed and used the same as to exclude and keep out the said defendants from said possession; and that said Ross and Duane, so acting in conjunction with said Sweeney, were men of bad character, and reputed to be lawless, violent, and dangerous men.

And defendants deny that said Sweeney ever claimed said land in good faith as his property, or enjoyed the sole, or exclusive, or peaceable possession thereof.

VIII.

And defendants admit and aver that previous to the 1st day of April, 1868, all taxes which had been assessed upon said land during the five fiscal years preceding the year beginning July 1st, 1866, were paid; but
aver that the same were paid by the defendants and their grantors,
42 or those under whom they claim, and that Sweeney and said plaintiff never paid, nor did either of them ever pay, any tax whatever on said land.

IX.

And the defendants admit and aver that the amount assessed upon said lands by the committee designated as the "Outside Land Committee," provided for in the order of the board of supervisors hereinbefore referred to was paid to the county treasurer of the city and county of San Francisco prior to the 14th day of March, 1870, and was so paid by these defendants and those under whom they claim, and that no portion thereof was paid by said Sweeney or said plaintiff.

X.

And defendants admit and aver that on or about the 15th day of January, 1870, (and not in April, as averred in the complaint,) the said David Connely presented to the board of supervisors of San Francisco his petition in writing, setting forth, among other things, that he, by himself and his tenants and those under whom he claimed and derived possession, had been from and including the 8th day of March, A. D. 1866, and still was in the possession of certain lands therein described, which lands were the same lands described in Exhibit A, annexed to the complaint herein, excepting a number of streets which had by the
public authorities been laid out through and across said lands,
43 and in his said petition asked for a grant of said lands in his petition set out, from said city and county to himself. And defendant denies that said petition of said Connely did not set forth that said Connely, either by himself, his tenants, or the person through whom he claimed or derived possession, was in possession of said land, or any

part thereof, on the 8th day of March, 1866. And the defendants aver that said petition was in due form of law, and contained all the allegations necessary and proper to said proceedings.

XI.

And the defendants aver that before the presenting of the said petition by the said Connely, the said Baird, Smith, Hager, Sullivan, Roberts, and William C. Walker and others holding in conjunction with them and as their co-tenants, had, by deeds in due form of law, conveyed said lands to said Connely, and that at the time of presenting said petition, he still held said lands, and was in possession thereof by himself and his tenants; and that the possession of his said grantors so recovered in said action in said district court, and their re-entry on said lands did in legal effect relate back to the time of the disseizin of said grantors of said Connely by said Sweeney and his said co-trespassers, and that said persons under and through whom said Connely claimed and derived possession were in possession of said premises in said petition described,
and the whole thereof on the said 8th day of March, A. D. 1866,
44 and thence to the spring of 1866, and to the commencement of this suit.

XII.

And defendants admit and aver on information and belief, that after the presentation of said petition by said David W. Connely, he appeared before the clerk of said outside land committee, and introduced in substance the facts hereinabove set forth, and did thereby show that he was in possession of said lands at the time of presenting his said petition, and that the persons through whom he claimed and derived possession were on the said 8th day of March, 1866, in point of law, in possession of said lands described in his said petition.

XIII.

And the defendants admit and aver that said Sweeney did not present his petition to the board of supervisors under the provisions of the said act of the legislature, and that said Sweeney could not rightfully have done so, because among other things said Sweeney never was at any time in the bona fide possession of said lands or any part thereof, and could not have verified by oath the necessary petition therefor; and never could have established in his favor the facts necessary to have secured a decision favorable to his claim, or to have entitled him to a deed from said city and county.

XIV.

45 And the defendants admit and aver on their information and belief, that said board of supervisors, upon the said petition and evidence of said David W. Connely, so as aforesaid presented, and not otherwise, did adjudge and award a grant of said lands to said Connely and said Mayor, in said year eighteen hundred and seventy, did execute, acknowledge, and deliver to said Connely deeds of conveyance of said tract of land, (except the lands reserved for and laid out through said lands for public streets and highways, and excepting also a portion, viz, about twenty acres reserved for part of the public park, by said city and

county,) and that to each of said deeds there was duly affixed the corporate seal of said city and county, and also that said Connely did, before presentation of his said petition, pay to the tax collector of said city and county the amount assessed by said outside land committee on said lands so deeded, to pay for the lands reserved for public use, according to said section ten of said order eight hundred, and also paid all taxes on said lands (which he and his grantors had not previously paid), for the five fiscal years preceding the year ending July 1st, 1866, and all the taxes levied on said lands for State and municipal purposes, due and remaining unpaid at the date of said petition. But defendants deny that said payments were or that any of them was made in fraud of the rights of said Sweeney, or to prevent him from making the same; and the defendants deny, on their information and belief, that said
46 Sweeney was ready or willing, or offered to make said payments, or any of them, or that he at any time had any idea or intention of so doing; and deny that the officers, to whom said payments were by law to be made, refused to accept said payments, or any of them, from said Sweeney, because they aver, on their information and belief, that said Sweeney never offered to do so, or notified said officer, or any of them, of any wish on his part to do so.

And defendants admit and aver that a part of said land described in Exhibit A, annexed to the complaint, to wit, about twenty acres, were reserved by said city and county for public use as a park, by authority of acts of Congress and of said legislature, and orders and ordinances of said city and county, and that pursuant thereto, said city and county did pay to said Connely the sum of $20,000 as compensation for lands reserved for public use; and that said last-named sum is greater than the amount of taxes paid on said lands by said Connely.

XV AND XVI.

And the defendants admit and aver that said David W. Connely died leaving a will, and that the same was duly probated, and that letters testamentary duly issued thereon to said John H. Baird, as executor, and that he duly qualified as and is acting as such, as is alleged in the complaint in that behalf, and that the defendants in that
47 behalf named in the complaint are devisees, legatees, and beneficiaries under the said last will and testament of said David W. Connely.

XVII.

And the defendants admit and aver that the defendants in that behalf in the complaint named, by their true names, (and excluding said persons designated by fictitious names,) are in, and claim from the plaintiff, the possession of said lands so conveyed by said deeds to said David W. Connely, and claim the same in fee simple, absolute and in their own rights, respectively; and that their said claim and right and title is in part derived from said Connely. And they deny that said right or title, interest or claim, was acquired by them, or any of them, with notice or knowledge of the alleged facts set forth in the complaint, (except so far as said alleged facts are admitted or averred to be true herein,) or of the alleged rights of the plaintiff or those under whom he claims; and deny that the title derived by the defendants from said Connely is subject in their or any of their hands to the supposed trust or equities in favor of said plaintiff or said Sweeney, and deny that said

Sweeney or said plaintiff ever had any right or any equities in said premises.

And the defendants deny that under said acts of Congress, or any of them, or otherwise, the said city of San Francisco acquired the legal title to the said lands, in trust for said Daniel Sweeney, and deny
48 that said Sweeney was, on the passage of said acts of Congress, or any of them, or any other time, in the bona fide, actual possession of said lands, or any part thereof; and deny that he ever, at any time, had any possession of said lands except in bad faith, and as an intruder and trespasser on the actual possession of the defendants and those under whom they claim, as hereinabove set forth and shown.

And the defendants deny that by virtue of said order of said board of supervisors, referred to in that behalf in the complaint, and the act of the legislature ratifying and confirming the same, or by virtue of either said order or act, or otherwise, all or any of the right, title, or claim of said city, as the grantee under said act of Congress, or otherwise, in or to said lands, vested in said plaintiff, upon the payment to the said treasurer of said city and county of the amount assessed by said committee, and on the payment previous to the first day of April, 1868, of all taxes which had been assessed upon said land during the said five fiscal years preceding the year beginning July first, eighteen hundred and fifty-six, or upon the payment of any sum whatever, or upon any other condition, or at all.

And defendants deny that said Sweeney was the beneficiary under said act of Congress, or the holder of the title of said city of San Francisco, by virtue of the order of the board of supervisors in the complaint in that behalf referred to, and of the act of the legislature ratifying and confirming the same; and deny that as such alleged
49 beneficiary, or holder of said title, or otherwise, said Sweeney was at any time entitled to receive from said city the deed of conveyance provided for in the act of the legislature of California, approved March 14th, 1870.

And the defendants deny that said David W. Connely contrived to wrong or defraud said Sweeney, and deny that contriving to wrong or defraud said Sweeney, or otherwise, he did, by any false pretences, allegations or proofs, in his own name or unto himself, or for his own benefit, obtain a conveyance from said city and county for the land described in said Exhibit A, or any part thereof; and they deny that said Connely did make any false pretence, allegation, or proof whatever in the premises.

XVIII.

And the defendants deny on information and belief, and according thereto, that said plaintiff, through various mesne conveyances or otherwise, did before the commencement of this action, or at any time acquire, or that he held at the time of the commencement of this action, or at any time, all or any of the right, title, or interest, or claim owned or held by said Sweeney in or to the lands aforesaid, or any part thereof, on the 8th day of March, 1866, or from thence hitherto, or any other time, or at all; and they deny that said Sweeney at any time had any right, title, or interest whatever in or to said lands, or any part
50 thereof, and they aver on information and belief that heretofore, to wit, after the said verdict and judgment had been duly rendered against said Sweeney and his fellow trespassers as herein above set forth, and prior to the said appeal therein to the said Supreme Court, the said plaintiff entered into an agreement with said Sweeney to ad-

vance funds to the latter to enable him to prosecute said appeal, and that in order to secure said plaintiff for such moneys which were afterwards advanced to said Sweeney for said purpose, the latter executed to said plaintiff a deed purporting to convey to said plaintiff all the right, title, and interest of the said Sweeney in and to said lands, and that said plaintiff at the time of paying said money and receiving said deed, well knew all the matters and things hereinabove set forth, and joined with said Sweeney in said attempt to swindle and defraud said plaintiff in said action, and that said Trenouth thereafter aided and assisted said Sweeney in said appeal, and now prosecutes this action on behalf of himself and said Sweeney, on some secret understanding between themselves for their mutual profit and gain.

And for a further and separate defence, the defendants aver that heretofore, to wit, on the sixth day of April, 1867, the said John H. Baird, John S. Hager, Eugene L. Sullivan, and Benjamin Smith, executor of the last will and testament of Charles K. Smith, deceased, together with Isaac K. Roberts and William C. Walker, as plaint-
51 iffs, recovered of and from said Daniel Sweeney, Charles P. Duane, John A. Kelly, and Mary E. Ross, executrix of the last will and testament of William G. Ross, deceased, as defendants, in and by the judgment of the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, in an action in said court then and there pending between said plaintiffs and said defendant aforesaid in said action, the possession of the said lands and premises in the complaint referred to and described, together with the costs and disbursements of said plaintiffs, amounting to thirteen hundred and sixty-five dollars, and that said judgment remains wholly unreversed and in no respect vacated, set aside or modified, and in full force and effect.

And the defendants aver that the possession of said Daniel Sweeney of said lands and premises, set forth and alleged in the complaint, is the same possession which the said plaintiffs in that action recovered therein, of and from said Sweeney, and said other defendants therein as wrongfully withheld from the said plaintiffs in that action; and that said Sweeney had at no time, and has not now, any right, title, or interest in, to, or upon said lands or the possession thereof, or any part thereof, except what was held and possessed by him at and before the commencement of said action, and except what was involved therein and determined by the said judgment, and that at no time was the
52 possession of said Sweeney of said lands bona fide, but, on the contrary, said possession was mala fide, and that in such bad faith the said lands were withheld from said plaintiffs in said action, who were as against said defendants therein, the true owners, and entitled to the possession of said lands and premises.

And defendants aver that after the said recovery of said judgment in said action as aforesaid, and before commencement of this action, the sheriff of said city and county, under the writ of said court, issued in said cause upon said judgment, in due form of law ousted and expelled said Sweeney and said other defendants in said action off and from the said lands and the possession thereof, and placed said plaintiffs in said action in full and actual possession of said lands, and that they and their grantors have ever since held actual possession thereof.

And defendants aver that said David Connely, in said complaint named, at the times therein referred to, held and claimed said land under divers conveyances and mesne conveyances from said plaintiffs in said action referred to, and as such instituted said proceedings before said

board of supervisors, and obtained said deeds in that behalf in the complaint alleged, and that these defendants hold, own, claim, and possess said lands under John H. Baird, John S. Hager, Eugene L. Sullivan, Isaac R. Roberts, William C. Walker, and Benjamin Smith, ex-
53 ecutor of Charles K. Smith, deceased, and also under said David W. Connely, since the execution to him by said city and county of San Francisco of said deeds referred to in the complaint; and defendants aver that said Sweeney had not at any time the requisite position, or rights, or claim, or possession, to entitle him to any deed of said lands, or any part thereof, from said city and county, nor to take or receive the benefit of said orders, or acts of the legislature or Congress.

And for a further and separate defence, these defendants aver that the said David W. Connely obtained the said deeds of conveyance referred to in the complaint from said city and county by due proceedings, according to the statutes and said orders of said city and county in that case made and provided, and adversely to said Sweeney and Trenouth, and each of them, and not on their behalf or the behalf of either of them, and by reason of the acts, possession, and claim of said Connelly and those under whom he claimed in opposition and hostility to the claims of said Sweeney and Trenouth, and each of them; and that these defendants hold, own, and claim said lands and premises under the said Connely, deceased.

And for a further and separate defence, these defendants aver that said Sweeney was not, on the passage of said act of Congress, entitled "An act to quiet the title to certain lands within the corporate
54 limits of the city of San Francisco," approved March 8th, 1866, in the bona fide, actual, possession, by himself or any tenant or tenants, of the lands described or referred to in the complaint, or any part thereof, and that said lands are within the limits and boundaries described in said act of Congress and intended to be embraced therein.

And for a further and separate defence, these defendants aver that neither said Sweeney nor said plaintiff at any time presented to said committee on outside lands referred to in said complaint a description or diagram of the said lands described in the complaint, or any part thereof, and did not have the same delineated on the said map mentioned in said order No. 800, referrred to in the complaint.

And for a further and separate defence, these defendants aver that neither said Sweeney nor said plaintiff presented any petition to the board of supervisors of said city and county, at any time pursuant to said act of the legislature, approved March 14th, 1870, entitled "An act to expedite the settlement of land-titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," nor presented any petition whatever to said board of or concerning or relating to said lands, or any part thereof, and did not at any time or in any manner claim said lands, or any part thereof, from said city and county, or any offices thereof, and did
55 not at any time or in any manner oppose or protest against the said petition or proceedings of said David W. Connely.

Wherefore the defendants pray judgment against said plaintiff, and that they may have their costs in this behalf expended.

S. M. WILSON,
Attorney for these Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John H. Baird, being duly sworn on behalf of himself and the other

defendants above named, says that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true.

JOHN H. BAIRD.

Subscribed and sworn to before me this 17th day of September, 1872.
[NOTARIAL SEAL.] F. J. THIBUALT,
Notary Public.

(Endorsed:)

Service of a copy of the within admitted this 17th day of September, 1872.

HOGE, *f'r Pl'ff.*

Filed Sept. 17, 1872.

WM. HARNEY, *Clerk,*
By BERT McNULTY,
Dep. Clerk.

56 *Answer of George F. Sharp.*

(Title of court and cause.)

And now comes George F. Sharp, one of the defendants in the above-entitled action, and for answer to the complaint herein:

First. That he denies all and singular each and every allegation contained in said complaint.

Second. And for a further and separate answer and defence herein, this defendant says:

That said defendant Sharp was, on the 1st day of January, 1861, the owner and seized and possessed of that portion of the premises conveyed by said Connely to said Sharp by deed dated April 6, 1871, referred to in the complaint, and that he, the said Sharp, was entitled to receive the city title therefor; that by mistake of said Connely he petitioned the city and county of San Francisco to grant to him, said Connely, said premises belonging to said Sharp as aforesaid; that before said grant was made to him, Connely, and by an agreement between said Sharp and said Connely, it was agreed that the said Connely would convey the said premises to the said Sharp if the said Sharp would allow him to obtain a conveyance thereof from the city and county of San Francisco; and that afterwards, on the 6th day of April, 1871, and after said Connely had obtained such deed from the city and county of San Francisco, he, said Connely, in pursuance of the aforesaid agreement, made a deed to said Sharp of said premises.

57 And that this defendant alleges that long prior to the said deed of the city and county of San Francisco to the said Connely, and said Connely to said Sharp, he was seized and possessed of said premises as the owner thereof, and that he derived no title to said premises by reason of said conveyance made by him to said Connely, because for more than ten years prior thereto he has been by himself and his tenants in the actual bona fide possession thereof, and entitled to receive a deed of said premises from the city.

Wherefore this defendant prays that said complaint be dismissed as to this defendant with his costs.

Dated San Francisco, January 23d, 1873.

HUNT & RISING,
Att'ys for Def't.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George F. Sharp, being duly sworn, deposes and says, that he is one of the defendants in the above entitled action; that he has read the foregoing answer, heard and knows the contents thereof; that the same is true of his own knowledge, except those matters as are therein stated upon his information and belief, and as to those matters he believes it to be true.

GEO. F. SHARP.

Subscribed and sworn to before me this 24th day of January, A. D. 1873.

[NOTARIAL SEAL.] W. G. HOLMES,
Notary Public.

58 (Endorsed.)
Service of a copy of within answer admitted this January 23, 1873.

J. P. HOGE.

Filed Jan. 24th, 1873.

WM. HARNEY, *Clerk*,
By SP. C. BROWN, *Dep. Clerk.*

HUNT & RISING,
Att'ys for Def't.

Answer.

(Title of court and cause.)

The defendants, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Nerissa C. Whitney, (sued as Narissa C. Whitney,) Harley W. Luddington, Mrs. Allison Bowers, William C. Watson, R. Bonner, (sued as C. Bonner.)

I.

The defendants admit and aver that on the 8th day of March, A. D. 1866, the city and county of San Francisco was a municipal corporation formed, established and existing under the laws of the State of California; that is to say, an act of the legislature of the said State entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, to consolidate the government thereof," passed April 19th, 1856; and has ever since continued to be, and still is, such municipal corpora-
59 tion, and was and is the successor in all respects of the former city of San Francisco, and that the latter was a municipal corporation under and by virtue of the act of the legislature of said State entitled "An act to re-incorporate the city of San Francisco," passed April 15th, 1851, both of which acts are expressly referred to and made part of this answer; and that said city was the successor in interest and estate of the pueblo or town which existed under the laws and regulations of the Mexican Government at the time of the cession of the territory now composing the State of California by said Mexican Government to the United States of America.

II.

And the defendants admit and and aver that on the 8th day of March, 1866, the said United States were the owners and holders of the legal title to certain lands in said State and within the corporate limits of said city and county, and that there were and are certain other lands in said corporate limits which were at the time of said cession by Mexico to the United States held, owned and claimed by said pueblo as pueblo lands, under said laws and regulations of Mexico, and which passed to said city of San Francisco as the successor of said pueblo, and thence to the said city and county.

III.

60 And the said defendants admit that the said act of Congress was passed and approved on said 8th day of March, 1866, and the same is expressly referred to.

IV AND V.

And the said defendants admit and aver that on January 14th, 1868, the order No. 800, referred to in the complaint, was passed, and that the same was ratified and confirmed by said act of the legislature entitled "An act to confirm a certain order passed by the board of supervisors of the city and county of San Francisco," passed March 27th, 1868, which act and order therein set forth are expressly referred to and made part of this answer.

And the defendants aver that said order was further ratified and modified by the act of the legislature of this State entitled "An act further to provide for the ratification and confirmation of a certain order passed by the board of supervisors of the city and county of San Francisco, and to modify certain provisions of the same," passed March 27th, 1868, which is also referred to and made part hereof.

VI.

And the defendants admit and aver that on the 14th day of March, A. D. 1870, the legislature of this State passed the act entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of
61 certain of the authorities thereof," which act is here expressly referred to and made part hereof.

VII.

And the defendants deny that the said Daniel Sweeney was, on the 8th day of March, 1866, or at any other time, in the bona fide actual possession, or in any possession at all, except as hereinafter shown, of the said tract of land described in said Exhibit A, annexed to the complaint, or any part of said lands; and deny that said lands or any part thereof had been or was vacant or unoccupied from the time of the cession of the State of California to the United States until the 11th day of April, 1863; and deny, on their information and belief, that the same or any part thereof was vacant or unoccupied at any time after the 25th day of April, 1854. On the contrary, defendants aver, on information and belief, that said lands were at all times from said last named day down

to the time of the trespasses and ouster hereinafter shown occupied and actually possessed and enjoyed by the defendants and their grantors and those under whom they claim and their tenants and the tenants of their grantors; and that in or about the month of May, 1863, the defendants, John H. Baird, John S. Hager, Eugene L. Sullivan, together with their tenants in common, Charles K. Smith, Isaac R. Roberts, and William C. Walker, were in the bona fide actual possession of
62 said lands, claiming the same in their own right and adversely to all others, and that whilst so possessed, viz, the said Daniel Sweeney, together with Charles P. Duane, William G. Ross and John A. Kelly, and their workmen, on their behalf, at the time last aforesaid, wrongfully and unlawfully entered into and upon said possession, and wrongfully and unlawfully ejected and ousted the said Baird, Hager, Smith, Sullivan, Roberts and Walker from the said lands, and wrongfuly withheld them from the said last named persons until as hereinafter shown, well knowing the rights and title of said persons to said lands, and which entry, trespass and ouster were each and all made by said Sweeney, Duane, Ross and Kelly, by conspiracy and combination, in bad faith and with intent to cheat and defraud the said Baird, Hager, Smith, Sullivan, Roberts and Walker out of their said lands and possessions, and with intent to hold and retain said lands by force, arms and violence, fraud and perjury.

And the defendants aver that afterwards, to wit, on the 11th day of September, 1865, the said last named persons commenced an action against said Sweeney, Duane, Ross, Kelly, Patrick H. Owens and Frederick Hood, Daniel Harvey, Daniel Donaldson, John Doe and Richard Roe, in the district court of the fourth judicial district of the State of California, in the city and county of San Francisco, to recover the possession of said land, together with damages for the detention and
63 costs of suit; and in said action the plaintiffs therein averred that on the 1st day of January, 1863, and prior thereto, they were the owners and lawfully possessed of said tract and parcel of land, and that whilst so possessed, afterwards and on the 11th day of May, 1863, the defendants in said action wrongfully entered into and upon the possession of said tract and parcel of land, and wrongfully and unlawfully ejected and ousted the plaintiffs therefrom, and had ever since unlawfully kept the plaintiff out of the possession of the same; and the said Sweeney, Duane, Ross and Kelly filed their answers in said action in due course of proceeding, and denied the said averments in said complaint in said action against them; and said Sweeney, in his said answer, set up and averred that the said Duane then was, and at the several times in the complaint mentioned had been lawfully possessed in fee simple of the title to said property and every part thereof, and that the other defendants in said action were then in possession, holding under said Duane and the said defendant Sweeney, by agreement to purchase from said Duane.

And the defendants further aver that afterwards, to wit, on the 24th day of November, 1866, the said Charles K. Smith, one of the plaintiffs in said action, and William G. Ross, one of the defendants therein, having theretofore died pending said action, the said district court, after due proceedings for that purpose made, ordered that said action
64 should be continued by said Benjamin Smith, as executor of said Charles K. Smith, deceased, as one of the plaintiffs, and against Mary Esther Ross, as executrix of William G. Ross, deceased, as one of the defendants. And defendants aver that said William G. Ross and Charles K. Smith had respectively died prior to said order of said court,

each leaving his last will and testament, and that the same were each duly admitted to probate in the probate court of the city and county of San Francisco, and letters testamentary thereon issued respectively to said Benjamin Smith and said Mary Esther Ross, and that they respectively and duly qualified as such, and entered upon the duties of said respective trusts; and that said orders and judgments of said probate court were each and all duly given and made; and that said Mary E. Ross, as such executrix, after the making of said order of said district court, appeared in said case by her attorneys, and joined issue with the said plaintiffs therein.

And the defendants aver that afterwards, to wit, on the 13th day of February, 1867, said action came on for trial in regular order on the calendar of said fourth district court, and it appearing that the defendants, Frederick Hood, Daniel Harvey, Daniel Donaldson, John Doe and Richard Roe had not been served with summons, and had never been in possession of said premises, was ordered by the court that said action as to said Hood, Harvey, Doe, Roe, and Donaldson should be
65 dismissed; and thereupon a full and fair trial was had in said district court, between said plaintiffs in said action and said remaining defendants, including said Daniel Sweeney, upon the merits of the respective rights of said plaintiffs and defendants in and to said lands, and upon said trial it was, on the 6th day of April, 1867, in and by the judgment of said district court, ordered and adjudged that the said plaintiffs therein, John H. Baird, John S. Hager, Eugene L. Sullivan, Isaac R. Roberts, William C. Walker, and Benjamin Smith, executor of the last will and testament of Charles K. Smith, deceased, should have and recover the possession of the said lands and premises described in said complaint (which were the same lands described and referred to in the complaint in this action), of and from the said defendants Charles P. Duane, John A. Kelly, Daniel Sweeney, and Mary E. Ross, executrix of the last will and testament of William G. Ross, deceased; and it was further ordered and adjudged therein that the said plaintiffs should have and recover of said defendants Duane, Sweeney, Kelly, and Ross, executrix of Ross (to be paid by her in due course of administration) the costs and disbursements of said plaintiffs sustained, amounting to thirteen hundred and sixty-five dollars; all of which will more fully appear by the said record of said district court, and which judgment has been in nowise vacated, set aside, or reversed, but remains in full force and effect.

66 And the defendants herein aver that afterwards the said cause was carried by said defendants in that action, upon appeal, to the supreme court of this State; and that afterwards, and at and about the April term, 1869, of said supreme court, the said judgment of the said district court was duly affirmed by the judgment of said supreme court, which latter judgment remains in full force and effect, and in nowise set aside, vacated, or set down for rehearing.

And defendants aver that afterwards, to wit, on the 2d day of September, 1869, the remittitur of said supreme court, duly issued on said judgment of affirmance, was filed in said district court, and the due and proper orders made thereon, and that shortly thereafter, in pursuance of said judgment of said district court, the writ of said court was duly issued for that purpose, and by virtue thereof the sheriff of said city and county duly ejected said defendants in said action from said land and premises, and placed the said plaintiffs therein in actual possession, and they, together with those claiming under them, have ever since held and

do now hold actual possession thereof, claiming the same for themselves and in their own right.

And defendants aver that the said ejectment of said Sweeney, alleged in the complaint herein to have occurred in the spring of 1869, in the same ejectment made by said sheriff as aforesaid.

67 And the defendants aver that by reason of said judgments of said district court, and said proceedings, the said Sweeney and his said grantor, the plaintiff herein, are both and each estopped to set up and aver the said matters and things set up in said complaint, or to claim said lands by reason of his said trespasses upon said defendants, and these defendants rely on said estoppel.

And the defendants deny that said Sweeney ever took possession of said lands or any part thereof, except in conjunction with his fellow wrong-doers, said Duane, Ross, and Kelly, and in bad faith and under said combination and conspiracy between them to cheat and defraud the defendants, and deny that he enclosed the said land or any part thereof with a substantial fence, but that the same had been previously enclosed by such a fence by defendants and their grantors, which was at the time of said trespasses standing in good condition in almost its entirety, and that the said Sweeney and his said fellow wrongdoers took the said fences of the defendants and a house standing on said land and erected by the grantors of the defendants, and used and appropriated them to their own uses.

And defendants deny that said Sweeney was desirous of availing himself of the benefits of the pre-emption laws, or that for such purpose he went upon said lands, or erected a fence or built a house thereon, but that all his acts and doings on said land were in conjunction with his said co-conspirators and for the joint benefit of all.

68 And defendants deny that said Sweeney ever had any separate or exclusive possession of said lands or any part thereof, but occupied a part thereof only, and that he held for his fellow wrongdoers, and that they, one or more, occupied other parts of said land, but all for the common purpose of defrauding the defendants.

And defendants admit that said Sweeney, for the purpose of aiding in said conspiracy and wrong, took some proceedings in said United States Land Office, on or about the 14th May, 1863, but deny that he duly filed his pre-emption claim to said premises, and deny, on information and belief, that his said paper had any force or effect whatever; and aver that said lands were not open to such claims, but were exempted by law and the authority of the United States government from pre-emption claims.

And defendants admit and aver that in the fall of 1863, after said Sweeney, Duane, Kelly and Ross had so wrongfully entered and trespassed upon the actual possession of said defendants, and wrongfully ousted them from said lands, the said Sweeney, acting in conjunction with his said co-trespassers, cultivated a very small patch (and no more) of said land, and let a cow and horse run upon the same to pasture, all of which was done to exclude defendants therefrom, and give a color to said wrongful possession; that during the entire time said Sweeney,

69 Duane, Kelly, and Ross held said lands by their said trespass, they did not, nor did any of them, cultivate the one-hundredth part thereof, or pasture thereon more than one or two cows, or a horse or two, for a short time, and that they failed to use or subject said lands to any useful or beneficial purpose, and only so possessed and used the same as to exclude and keep out the said defendants from said possession; and the said Ross and Duane, so acting in conjunction with said Swee-

ney, were men of bad character, and reputed to be lawless, violent, and dangerous men.

And defendants deny that said Sweeney ever claimed said land in good faith as his property, or enjoyed the sole or exclusive or peaceable possession thereof.

VIII.

And defendants admit and aver that previous to the 1st day of April, 1868, all taxes which had been assessed upon said land during the five fiscal years preceding the year beginning July 1st, 1866, were paid; but aver that the same were paid by the defendants and their grantors, or those under whom they claim, and that Sweeney and said plaintiff never paid, nor did either of them ever pay any tax whatever on said land.

IX.

And the defendants admit and aver that the amount assessed upon said lands by the committee designated as the "Outside Land Committee," provided for in the order of the board of supervisors hereinbefore referred to, was paid to the county treasurer of the city and
70 county of San Francisco prior to the 14th day of March, 1870, and was so paid by these defendants and those under whom they claim, and that no portion thereof was paid by said Sweeney or said plaintiff.

X.

And defendants admit and aver that on or about the 15th day of January, 1870 (and not in April as averred in the complaint), the said David Connely presented to the board of supervisors of San Francisco his petition in writing, setting forth, among other things, that he, by himself and his tenants, and those under whom he claimed and derived possession, had been from and including the 8th day of March, A. D. 1866, and still was in the possession of certain lands therein described, which lands were the same lands described in Exhibit A, annexed to the complaint herein, excepting a number of streets which had by the public authorities been laid out through and across said lands, and in his said petition asked for a grant of said lands in his petition set out, from said city and county to himself. And defendant denies that said petition of said Connely did not set forth that said Connely, either by himself, his tenants, or the person through whom he claimed or derived possession, was in possession of said land, or any part thereof, on the 8th day of March, 1866. And the defendants aver that said petition was in due form of law, and contained all the allegations necessary and proper to said proceedings.

71 XI.

And the defendants aver that before the presenting of the said petition by the said Connely, the said Baird, Smith, Hager, Sullivan, Roberts and William C. Walker and others holding in conjunction with them, and as their co-tenants, had by deeds in due form of law conveyed said lands to said Connely, and that at the time of presenting said petition he still held said lands, and was in possession thereof by himself, and his tenants; and that the possession of his said grantors so recovered in said ac

tion in said district court, and their re-entry on said lands, did in legal effect relate back to the time of the division of said grantors of said Connely by said Sweeney and his said co trespassers, and that said persons under and through whom said Connely claimed and derived possession were in possession of said premises in said petition described, and the whole thereof, on the said 8th day of March, A. D. 1866, and thence to the spring of 1866, and to the commencement of this suit.

XII.

And defendants admit and aver on information and belief, that after the presentation of said petition by said David W. Connely, he appeared before the clerk of said outside land committee, and introduced in substance the facts hereinbefore set forth, and did thereby show that he was in possession of said lands at the time of presenting his said
72 petition, and that the persons through whom he claimed and derived possession were on the said 8th day of March, 1866, in point of law, in possession of said lands described in his said petition.

XIII.

And the defendants admit and aver that said Sweeney did not present his petition to the board of supervisors under the provisions of the said act of the legislature, and that said Sweeney could not rightfully have done so, because among other things said Sweeney never was at any time in the bona fide possession of said lands, or any part thereof, and could not have verified by oath the necessary petition therefor; and never could have established in his favor the facts necessary to have secured a decision favorable to his claim, or to have entitled him to a deed from said city and county.

XIV.

And the defendants admit and aver on their information and belief, that said board of supervisors, upon the said petition and evidence of said David W. Connely, so as aforesaid presented, and not otherwise, did award and adjudge a grant of said lands to said Connely and said mayor, in said year eighteen hundred and seventy, did execute, acknowledge and deliver to said Connely deeds of conveyance of said tract of land, (except the lands reserved for and laid out through said lands for public streets and highways, and excepting also a portion, viz about twenty acres, reserved for part of
73 the public park by said city and county), and that to each of said deeds there was duly affixed the corporate seal of said city and county, and, also, that said Connely did, before presentation of his said petition, pay to the tax collector of said city and county the amount assessed by said outside land committee on said lands so deeded, to pay for the lands reserved for public use according to said section ten of said order eight hundred, and also paid all taxes on said lands (which he and his grantors had not previously paid), for the five fiscal years preceding the year ending July 1st, 1866, and all the taxes levied on said lands for State and municipal purposes, due and remaining unpaid at the date of said petition; but defendants deny that said payments were, or that any of them was, made in fraud of the rights of said Sweeney, or to prevent him from making the same; and the defendants deny on their information and belief that said Sweeney was ready or

willing, or offered to make said payments, or any of them, or that he at any time had any idea or intention of so doing; and deny that the officers, to whom said payments were by law to be made, refused to accept said payments or any of them from said Sweeney, because, they aver, on their information and belief, that said Sweeney never offered to do so, or notified said officer or any of them of any wish on his part to do so.

And defendants admit and aver that a part of said land de-
74 scribed in Exhibit A, annexed to the complaint, to wit, about twenty acres, were reserved by said city and county for public use as a park, by the authority of the acts of Congress and of said legislature, and orders and ordinances of said city and county, and that pursuant thereto said city and county did pay to said Connely the sum of $20,000 as compensation for lands reserved for public use; and that said last-named sum is greater than the amount of taxes paid on said lands by said Connely.

XV AND XVI.

And the defendants admit and aver that said David W. Connely died leaving a will, and that the same was duly probated, and that letters testamentary duly issued thereon to said John H. Baird, as executor, and that he duly qualified as is acting as such, as is alleged in the complaint in that behalf, and that the defendants in that behalf named in the complaint are devisees, legatees, and beneficiaries under the said last will and testament of said David W. Connely.

XVII.

And the defendants admit and aver that the defendants in that behalf in the complaint named by their true names (and excluding said persons designated by fictitious names) are in, and claim from the plaintiff, the possession of said lands so conveyed by said deeds to said

David W. Connely, and claim the same in fee simple absolute,
75 and in their own rights respectively, and that their said claim and right and title is in part derived from said Connely; and they deny that said right or title, interest or claim was acquired by them or any of them with notice or knowledge of the alleged facts set forth in the complaint (except so far as said alleged facts are admitted or averred to be true herein), or of the alleged rights of the plaintiff or those under whom he claims; and deny that the title derived by the defendants from said Connely, subject in their or any of their hands to the supposed trust or equities in favor of said plaintiff or said Sweeney, and deny that said Sweeney or said plaintiff ever had any right or any equities in said premises.

And the defendants deny that under said acts of Congress, or any of them, or otherwise, the said city of San Francisco acquired the legal title to the said lands, in trust for said Daniel Sweeney, was on the passage of said acts of Congress, or any of them, or any other time, in the bona fide actual possession of said lands, or any part thereof; and deny that he ever at any time had any possession of said lands, except in bad faith, and as an intruder and trespasser on the actual possession of the defendants and those under whom they claim, as hereinabove set forth and shown.

And the defendants deny that by virtue of said order of said board or supervisors, referred to in that behalf in the complaint, and the act
76 of the legislature ratifying and confirming the same, or by virtue of

either said order or act, or otherwise, all or any of the right, title, or claim of the said city as the grantee under said act of Congress, or otherwise, in or to said lands, vested in said plaintiff, upon the payment to the said treasurer of said city and county of the amount assessed by said committee, and on the payment previous to the first day of April, 1868, of all taxes which had been assessed upon said land during the said five fiscal years preceding the year beginning July first, eighteen hundred and fifty-six, or upon the payment of any sum whatever, or upon any other condition, or at all.

And defendants deny that said Sweeney was the beneficiary under said act of Congress, or the holder of the title of said city of San Francisco by virtue of the order of the board of supervisors in the complaint in that behalf referred to, and of the act of the legislature ratifying and confirming the same; and deny that as such alleged beneficiary or holder of said title, or otherwise, said Sweeney was at any time entitled to receive from said city the deed of conveyance provided for in the act of the legislature of California, approved March 14th, 1870.

And the defendants deny that said David W. Connely contrived to wrong or defraud said Sweeney, and deny that, contriving to wrong or defraud said Sweeney, or otherwise, he did by any false pretences, allegations, or proofs in his own name or unto himself, or for his own
77 benefit, obtain a conveyance from said city and county for the land described in said Exhibit A, or any part thereof; and they deny that said Connely did make any false pretence, allegation or proof whatever in the premises.

XVIII.

And the defendants deny on information and belief, and according thereto, that said plaintiff, through various mesne conveyances or otherwise, did before the commencement of this action at any time acquire, or that he held at the time of the commencement of this action, or at any time, all or any of the right, title, or interest, or claim owned or held by said Sweeney in or to the lands aforesaid, or any part thereof, on the 8th day of March, 1866, or from thence hitherto, or any other time, or at all; and they deny that said Sweeney at any time had any right, title, or interest whatever in or to said lands, or any part thereof, and they aver on information and belief that heretofore, to wit, after the said verdict and judgment had been duly rendered against said Sweeney and his fellow trespasser, as hereinbefore set forth, and prior to the said appeal therein to the said Supreme Court, the said plaintiff entered into an agreement with the said Sweeney to advance funds to the latter to enable him to prosecute said appeal, and that in order to secure said plaintiff for such moneys which were afterwards advanced to said Sweeney for said purpose, the latter executed to said plaintiff a deed
78 purporting to convey to said plaintiff all the right, title, and interest of the said Sweeney in and to said lands, and that said plaintiff, at the time of paying said money and receiving said deed, well knew all the matters and things hereinabove set forth, and joined with said Sweeney in said attempt to swindle and defraud said plaintiff in said action, and that said Trenouth thereafter aided and assisted said Sweeney in said appeal, and now prosecutes this action on behalf of himself and said Sweeney, on some secret understanding between themselves, for their mutual profit and gain.

And for a further and separate defence, the defendants aver that heretofore, to wit, on the sixth day of April, 1867, the said John H. Baird,

John S. Hager, Eugene L. Sullivan, and Benjamin Smith, executor of the last will and testament of Charles K. Smith, deceased, together with Isaac K. Roberts and William C. Walker, as plaintiffs, recovered of and from the said Daniel Sweeney, Charles P. Duane, John A. Kelly, and Mary C. Ross, executrix of the last will and testament of William G. Ross, deceased, as defendants, in and by the judgment of the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco, in an action in said court then and there pending between said plaintiffs and said defendant aforesaid in said action, the possession of the said lands and premises in the complaint referred to and described, together with the costs and dis-
79 bursements of said plaintiffs, amounting to thirteen hundred and sixty-five dollars, and that said judgment remains wholly unreversed, and in no respect vacated, set aside, or modified, and in full force and effect.

And the defendants aver that the possession of said Daniel Sweeney of said lands and premises, set forth and alleged in the complaint, is the same possession which the said plaintiffs in that action recovered therein of and from said Sweeney and said other defendants therein, as wrongfully withheld from the said plaintiffs in that action; and that said Sweeney had at no time, and has not now, any right, title, or interest in, to, or upon said lands, or the possession thereof, or any part thereof, except what was held and possessed by him at and before the commencement of said action, and except what was involved therein and determined by the said judgment, and that at no time was the possession of said Sweeney of said lands bona fide, but, on the contrary, said possession was mala fide, and that in such bad faith the said lands were withheld from said plaintiffs in said action, who were as against said defendants therein the true owners, and entitled to the possession of said lands and premises.

And defendants aver that after the said recovery of said judgment in said action, as aforesaid, and before the commencement of this action, the sheriff of said city and county, under the writ of said court,
80 issued in said cause upon said judgment, in due form of law, ousted and expelled said Sweeney and said other defendants in said action off and from the said lands and the possession thereof, and placed said plaintiffs in said action in full and actual possession of said lands, and that they and their grantees have ever since held actual possession thereof.

And defendants aver that said David Connely, in said complaint named, at the times therein referred to, held and claimed said land under divers conveyances and mesne conveyances from said plaintiffs in said action referred to, and as such instituted said proceedings before said board of supervisors, and obtained said deeds in that behalf in the complaint alleged, and that these defendants hold, own, claim, and possess said lands under John H. Baird, John S. Hager, Eugene L. Sullivan, Isaac R. Roberts, William C. Walker, and Benjamin Smith, executor of Charles K. Smith, deceased, and also under said David W. Connely, since the execution to him by said city and county of San Francisco of said deeds referred to in the complaint; and defendants aver that said Sweeney had not at any time the requisite position, or rights, or claim, or possession to entitle him to any deed of said lands, or any part thereof, from said city and county, nor to take or receive the benefits of said orders, or acts of the legislature or Congress.

And for a further and separate defence, that the said David
81 W. Connely obtained the said deeds of conveyance referred to in

the complaint from said city and county by due proceedings according to the statutes and said orders of said city and county in that case made and provided, and adversely to said Sweeney and Trenouth, and each of them, and not on their behalf or the behalf of either of them, and by reason of the acts, possession, and claim of said Connelly, and those under whom he claimed in opposition and hostility to the claims of said Sweeney and Trenouth, and each of them; and that these defendants hold, own, and claim said lands and premises under the said Connely, deceased.

And for a further and separate defence these defendants aver that said Sweeney was not, on the passage of said act of Congress, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," approved March 8th, 1866, in the bona fide, actual possession, by himself or any tenant or tenants, of the lands described or referred to in the complaint, or any part thereof, and that said lands are within the limits and boundaries described in said act of Congress, and intended to be embraced therein.

And for a further and separate defence these defendants aver that neither said Sweeney nor said plaintiff at any time presented to said committee on outside lands, referred to in said complaint, a description
82 or diagram of the said lands described in the complaint, or any part thereof, and did not have the same delineated on the said map mentioned in said Order No. 800, referred to in the complaint.

And for a further and separate defence these defendants aver that neither said Sweeney nor said plaintiff presented any petition to the board of supervisors of said city and county at any time pursuant to said act of the legislature, approved March 14th, 1870, entitled "An act to expedite the settlement of land titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," nor presented any petition whatever to said board of or concerning or relating to said lands, or any part thereof, and did not, at any time or in any manner, claim said lands, or any part thereof, from said city and county, or any offices thereof, and did not, at any time or in any manner, oppose or protest against the said petition or proceedings of said David W. Connely.

Wherefore the defendants pray judgment against said plaintiff, and that they may have their costs in this behalf expended.

S. M. WILSON,
Attorney for these Defendants.

(Endorsed.)

Due service of a copy of the within answer is hereby admitted, and verification thereof is hereby waived this 7th day of February, 1873.

HOGE & DELMAS,
For Complainant.

Filed Feb. 7, 1873.

WM. HARNEY, *Clerk*,
By C. M. BOYD, *Dep'y.*

83 *Judgment.—Entered in open court April* 26, 1875.

(Title of court and cause.)

The cause was called in regular order upon the equity calender, a trial by jury having been specially waived. J. P. Hoge and D. M. Delmas appeared as counsel for plaintiff, and S. M. Wilson and W. C. Burnett for the defendants. After argument had by counsel and due consider-

ation, the court ordered that the motion of the defendants for a nonsuit be granted, and that judgment thereon be entered herein in favor of defendants and against plaintiff for costs.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that this plaintiff take nothing by this action as against these defendants, but that these defendants, John H. Baird, executor of the last will and testament of David W. Connely, deceased; George F. Sharp, John H. Baird, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, widow of John Connely, deceased; Mray Stratton, Martha Jane Stratton, Sarah E. Stratton, William Stratton (sued as Williamson Stratton), Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Nerissa C. Whitney
84 (sued as Narissa C. Whitney), Wm. C. Watson, Harley W. Luddington) sued as Harley Y. Luddington), R. Bonner (sued as C. Bonner), Mrs. Allison Bowers, and the City and County of San Francisco, have and recover from this plaintiff, William Trenouth, their (defendants') costs in this behalf laid out and expended, amounting to the sum of sixteen ($16) dollars.

Judgment recorded May 4th, 1875.

Book A, page 365.

Plaintiff's bill of exceptions.

(Title of court and cause.)

Be it remembered that this cause came on regularly for trial before said court, at a regular term thereof, holden in and for the city and county of San Francisco, on Monday, the 26th day of April, A. D. 1875, both parties appearing, and being represented by their respective counsel.

Whereupon the plaintiff was requested by the court to state the facts upon which he relied, and which he expected to prove in support of his said action, and the plaintiff then and there stated that he expected to prove in that behalf:

I. That heretofore, to wit, on the 8th day of March, A. D. 1866, the city and county of San Francisco was a municipal corporation, formed, established, and existing under and by virtue of the laws of the State of California.

II. That on the day and year last aforesaid the United States
85 of America were the owners and holders of the legal title to certain lands in the State of California and within the corporate limits of said city and county of San Francisco.

III. That on said day the Congress of the United States passed an act, entitled "An act to quiet the titles to certain lands within the corporate limits of the city of San Francisco," which act was on the same day approved by the President of the United States; that by the provisions of said act, all right and title of the United States to the lands aforesaid were relinquished and granted to the said city of San Francisco and its successors, upon the following trusts, namely: That all said land should be disposed of and conveyed by said city to parties in the bona fide actual possession thereof by themselves or tenants, on the passage of said act, in such quantities and upon such terms and conditions as the legislature of the State of California might prescribe, ex

81 VS. CO[illegible]

cept such parcels thereof as might be reserved and set apart by ordinance of said city for public uses.

IV. That afterward, to wit, on the 14th day of January, A. D. 1868, for the purpose of carrying out the trusts imposed upon the said city of San Francisco by the aforesaid act of Congress of the United States, the board of supervisors of the city and county of San Francisco passed an order, entitled "Order No. 800—An order for the settlement and quieting of titles to land in the city and county of San Francisco, situate above high-water mark of the bay of San Francisco and the
86 Pacific Ocean, and without the corporate limits of the city of San Francisco"; that by said order it was among other things ordained:

First. That after the passage of said order, the board of supervisors of said city should proceed to devise and adopt a plan for the subdivision into blocks and lots of the land hereinbefore mentioned, and to select and set apart for public uses such lots and portions of said land as said board might deem necessary, subject to the limitations and provisions of said order hereinafter mentioned.

Secondly. That after the adoption of the plan hereinbefore mentioned, said board should cause to be made a map of said land according to said plan; that said map should show the streets and public highways, the blocks formed by the intersection of the streets and public highways, and the lots into which said blocks should be subdivided, and upon such map should be designated the lots and portions of land set apart for public uses and the particular use for which each lot or portion of land should have been set apart.

Thirdly. That upon the completion of the map hereinbefore mentioned, it should be deposited for public inspection in the office of the clerk of the board of supervisors, and there remain for a period of thirty days; and notice should be published in three of the daily papers during the whole of the time that said map should remain in said office.

Fourthly. That any person having or claiming any portion of
87 said land under and by virtue of the provisions of said order might, at any time before the completion of said map, or while the same might remain in the office of the clerk of the board of supervisors for public inspection, present to the committee on outside lands, hereinafter mentioned, a description and diagram of the lands in which he should so claim an interest, and have the same delineated on said map; but that no claim should be delineated on said map by said committee unless all taxes should have been paid thereon for five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six.

Fifthly. That after said map should have remained in the office of the clerk of the board of supervisors for the said period of thirty days, as provided in said order, the board of supervisors might examine the objections, if any were made thereto, and might make such alterations in the location or designation of any lots or portions of land set apart for public uses as might be necessary to obviate any objections which the said board should deem just and proper.

Sixthly. That as soon as the alterations hereinbefore mentioned should have been made and delineated on said map, the said map should become and be the official map of said lands, and the portions of land therein designated as public streets and highways, and the tracts or portions of land set apart and designated on said map as a public park, and the tract or portion of land set apart and designated thereon
88 as a cemetery, and lots for a hospital, city library, or other public purpose, should be deemed absolutely dedicated as such.

ation, the court ordered that the motion of the defendants for a nonsuit be granted, and that judgment thereon be entered herein in favor of defendants and against plaintiff for costs.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that this plaintiff take nothing by this action as against these defendants, but that these defendants, John H. Baird, executor of the last will and testament of David W. Connely, deceased; George F. Sharp, John H. Baird, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, widow of John Connely, deceased; Mray Stratton, Martha Jane Stratton, Sarah E. Stratton, William Stratton (sued as Williamson Stratton), Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Nerissa C. Whitney
84 (sued as Narissa C. Whitney), Wm. C. Watson, Harley W. Luddington) sued as Harley Y. Luddington), R. Bonner (sued as C. Bonner), Mrs. Allison Bowers, and the City and County of San Francisco, have and recover from this plaintiff, William Trenouth, their (defendants') costs in this behalf laid out and expended, amounting to the sum of sixteen ($16) dollars.

Judgment recorded May 4th, 1875.

Book A, page 365.

Plaintiff's bill of exceptions.

(Title of court and cause.)

Be it remembered that this cause came on regularly for trial before said court, at a regular term thereof, holden in and for the city and county of San Francisco, on Monday, the 26th day of April, A. D. 1875, both parties appearing, and being represented by their respective counsel.

Whereupon the plaintiff was requested by the court to state the facts upon which he relied, and which he expected to prove in support of his said action, and the plaintiff then and there stated that he expected to prove in that behalf:

I. That heretofore, to wit, on the 8th day of March, A. D. 1866, the city and county of San Francisco was a municipal corporation, formed, established, and existing under and by virtue of the laws of the State of California.

II. That on the day and year last aforesaid the United States
85 of America were the owners and holders of the legal title to certain lands in the State of California and within the corporate limits of said city and county of San Francisco.

III. That on said day the Congress of the United States passed an act, entitled "An act to quiet the titles to certain lands within the corporate limits of the city of San Francisco," which act was on the same day approved by the President of the United States; that by the provisions of said act, all right and title of the United States to the lands aforesaid were relinquished and granted to the said city of San Francisco and its successors, upon the following trusts, namely: That all said land should be disposed of and conveyed by said city to parties in the bona fide actual possession thereof by themselves or tenants, on the passage of said act, in such quantities and upon such terms and conditions as the legislature of the State of California might prescribe, ex

cept such parcels thereof as might be reserved and set apart by ordinance of said city for public uses.

IV. That afterward, to wit, on the 14th day of January, A. D. 1868, for the purpose of carrying out the trusts imposed upon the said city of San Francisco by the aforesaid act of Congress of the United States, the board of supervisors of the city and county of San Francisco passed an order, entitled "Order No. 800—An order for the settlement and quieting of titles to land in the city and county of San Francisco, situate above high-water mark of the bay of San Francisco and the
86 Pacific Ocean, and without the corporate limits of the city of San Francisco"; that by said order it was among other things ordained:

First. That after the passage of said order, the board of supervisors of said city should proceed to devise and adopt a plan for the subdivision into blocks and lots of the land hereinbefore mentioned, and to select and set apart for public uses such lots and portions of said land as said board might deem necessary, subject to the limitations and provisions of said order hereinafter mentioned.

Secondly. That after the adoption of the plan hereinbefore mentioned, said board should cause to be made a map of said land according to said plan; that said map should show the streets and public highways, the blocks formed by the intersection of the streets and public highways, and the lots into which said blocks should be subdivided, and upon such map should be designated the lots and portions of land set apart for public uses and the particular use for which each lot or portion of land should have been set apart.

Thirdly. That upon the completion of the map hereinbefore mentioned, it should be deposited for public inspection in the office of the clerk of the board of supervisors, and there remain for a period of thirty days; and notice should be published in three of the daily papers during the whole of the time that said map should remain in said office.

Fourthly. That any person having or claiming any portion of
87 said land under and by virtue of the provisions of said order might, at any time before the completion of said map, or while the same might remain in the office of the clerk of the board of supervisors for public inspection, present to the committee on outside lands, hereinafter mentioned, a description and diagram of the lands in which he should so claim an interest, and have the same delineated on said map; but that no claim should be delineated on said map by said committee unless all taxes should have been paid thereon for five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six.

Fifthly. That after said map should have remained in the office of the clerk of the board of supervisors for the said period of thirty days, as provided in said order, the board of supervisors might examine the objections, if any were made thereto, and might make such alterations in the location or designation of any lots or portions of land set apart for public uses as might be necessary to obviate any objections which the said board should deem just and proper.

Sixthly. That as soon as the alterations hereinbefore mentioned should have been made and delineated on said map, the said map should become and be the official map of said lands, and the portions of land therein designated as public streets and highways, and the tracts or portions of land set apart and designated on said map as a public park, and the tract or portion of land set apart and designated thereon
88 as a cemetery, and lots for a hospital, city library, or other public purpose, should be deemed absolutely dedicated as such.

Seventhly. That no person should be entitled to receive compensation for any lot or portion of land set apart for public use, unless his claim should have been delineated on the map hereinbefore mentioned, nor until all conflicting claims to such lot or portion of land should have been finally determined, and no person should be entitled to receive compensation for any portion of land indicated in any street or highway.

Eighthly. That after the committee hereinafter mentioned should have made their final report upon the said map and reservations, and the report should be ratified by the board of supervisors, it should be the further duty of the said committee to make just appraisement of the lands reserved for public uses other than for streets and highways, and to make a just and equitable assessment of the value of the lands so reserved, ratably and equitably, upon and to each piece and parcel of land delineated in said map according to the appraised value of said lands (exclusive of the lands reserved for public streets and highways.)

Ninthly. That upon payment to the county treasurer of the city and county of San Francisco of the amount assessed by the committee provided for in said order, the city and county of San Francisco should relinquish and grant, and by said order said city and county of San
89 Francisco did relinquish and grant all the right, title, and claim which the said city and county had at the time of the passage of said order, as grantee of the United States in and to the lands hereinabove mentioned, and not excepted or reserved, or intended to be excepted or reserved by the provisions of said order, and which might not be set apart for public use under any of the provisions of said order, and upon which should be paid previous to the first day of April, eighteen hundred and sixty-eight, all taxes which had been assessed thereon during the five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six, unto the person, or to the heirs and assigns of persons, who were, on the eighth day of March, eighteen hundred and sixty-six, in the actual, bona fide possession thereof by themselves or their tenants; that it was the intent and object of said order to pass the right, title and claim of said city and county in and to every tract or portion of said land delineated on said map, except the portions that were or might be reserved as aforesaid, possessed by one person, unto the possessor thereof in severalty.

Tenthly. That a committee of five members of the board of supervisors should be chosen by said board, whose duty it should be to prepare and report to the board the plan provided for in said order, to supervise the making of the map provided for in said order, to select, set apart, and designate the lots and portions of lands provided for in said
90 order to be set apart for public use, and generally to superintend the carrying out of the provisions of said order.

Eleventhly. That the board of supervisors should provide by order for the distribution and payment to those entitled thereto of the moneys assessed for the cost of reservations, and which should have been paid to the city and county treasurer under the provisions of said order.

V. That afterwards, to wit, on the 27th day of March, A. D. 1868, by an act entitled "An act to confirm a certain order passed by the board of supervisors of the city and county of San Francisco," passed and approved on that day, the legislature of California ratified and confirmed the order aforementioned and all acts which then had or might hereafter take place under its provisions.

VI. That afterwards, to wit, on the 14th day of March, A. D. 1870, the legislature of California passed an act entitled "An act to expedite the settlement of land titles in the city and county of San Francisco,

and to ratify and confirm the acts and proceedings of certain of the authorities thereof," which act was on the same day approved by the governor of said State; that by said act it was, among other things, enacted:

First. That upon receiving a petition from any person or persons claiming that they by themselves, their tenants, or the person through whom they claim or derive possession, had been from and including the eighth day of March, anno Domini eighteen hundred and sixty-
91 six, and still were in the possession of any of the lands described in the act of Congress of the United States in this complaint hereinbefore mentioned, and that they or the persons through whom they claim or derive possession, have paid to the tax collector of the city and county of San Francisco the amount assessed by the outside land committee upon the land described in said petition to pay for lands reserved for public use, as provided for in the order of the board of supervisors hereinbefore referred to, and also paid all taxes on said lands for the five fiscal years preceding the year beginning July 1, 1866, and all taxes levied on said lands for State and municipal purposes at the date of the said act of the legislature due and remaining unpaid; and that such lands have not been sold, leased, dedicated, reserved, or conveyed by authority of the said city and county of San Francisco, or the United States, to any one, or for any purpose, and asking for a grant from said city and county, the board of supervisors should proceed to act thereon as hereinafter specified; that said petition should be verified by the oath or affirmation of the party in whose behalf the petition is presented, or by some one acting as his agent and conversant with the facts detailed in the petition.

Secondly. That all petitions hereinbefore mentioned should be referred to the committee on outside lands; that the party present-
92 ing said petition might appear before the clerk of said board and make proof, verbal and documentary, of the matters alleged in his petition; that the proofs of the petitioner being noted, the said committee should proceed to consider the same, and should make such report and recommendation thereon as to them should seem just and proper in the premises; that if in the judgment of the board of supervisors the claim of the petitioner were well founded, they should adjudge and award a grant of such land to the petitioner or petitioners therefor, less the amount reserved for public use.

Thirdly. That the mayor of the city and county of San Francisco should thereupon execute, acknowledge, and deliver to the party or parties presenting the aforesaid petition a deed of conveyance of the tract or lot of land as aforesaid adjudged and awarded to the petitioner, and attach thereto the corporate seal of the city and county of San Francisco.

Fourthly. That a conveyance executed and delivered in pursuance of the provisions of said act should operate as an acknowledgment on the part of said city and county that the title to the land therein described had passed under and by virtue of the said order number eight hundred hereinabove mentioned, and also under and by virtue of the several acts of Congress and the legislature ratifying said orders, or under authority of which the same have been passed; and that such conveyance should likewise operate to grant, convey, remise, and release
93 to the party, his heirs and assigns named therein, the lands in such conveyance described, and all the estate and interest, present and future, of the said city and county of San Francisco in and to such lands.

VII. That on the 8th day of March, 1866, one Daniel Sweeney was in the bona fide actual possession of that portion of the lands hereinbefore mentioned as granted by the Congress of the United States of America, as aforesaid, to the city and county of San Francisco, which is described in the complaint herein; that the said premises had been and were vacant and unoccupied from the time of the cession of the State of California to the United States until the 11th day of April, A. D. 1863; that on the day last aforesaid, one Daniel Sweeney was a citizen of the United States over twenty-one years of age, the head of a family, and entitled to all the benefits of the pre-emption laws of the United States; that on the said day the said Sweeney, being desirous of availing himself of the benefits of the said pre-emption laws, went upon the premises aforesaid, enclosed them with a substantial fence, and built a dwelling-house upon the same; that after having taken possession of said premises as aforesaid, said Sweeney continued to occupy and reside upon the same; that upon the 14th day of May, 1863, said Sweeney duly filed his pre-emption claim to said premises in the United States land office at San Francisco; that in the fall of said year 1863, the said Sweeney cultivated said premises and used them for the
94 pasturage of cattle, and so continued to cultivate and use the same until the year 1869; that said Sweeney, together with his family, has continuously and uninterruptedly occupied and resided upon said premises from the fall of 1863 until the spring of 1869, when he was ejected from the same, making the same his home and that of his family, claiming the same in good faith as his property, and enjoying the sole, exclusive and peaceable possession thereof. That said Sweeney was so ejected by virtue of a writ of restitution issued out of the fourth judicial district court, in and for the city and county of San Francisco, upon a judgment of said court, rendered in an action of ejectment to recover the possession of said premises. That in said action John H. Baird, Eugene L. Sullivan, and the other defendants in this present action, or their grantors and predecessors in interest, were plaintiffs, and said Daniel Sweeney and others were defendants; that said action was commenced on the 11th day of September, 1865; that said judgment was originally rendered by said district court on the 6th day of April, 1867, and was affirmed by the supreme court of this State at the April term, 1869; that said writ of restitution was issued on the third day of September, 1869, and executed on the fourth day of September, 1869. But by virtue of said writ, said defendants, or their predecessors or grantors, were placed in possession of said premises. That the only question litigated in said action of ejectment was the
95 question of prior possession in the plaintiffs in said action, and that the title which said Sweeney may have had by virtue of the act of Congress and the various orders of the board of supervisors, and the acts of the legislature hereinabove referred to and the facts hereinabove stated, was in no way litigated or brought before the court in said action.

VIII. That previous to the first day of April, 1868, all taxes which had been assessed upon said land during the five fiscal years preceding the year beginning July first, eighteen hundred and sixty-six, were paid.

IX. That the amount assessed upon said land by the committee designated as the "Outside land committee," provided for in the order of the board of supervisors hereinbefore referred to, were paid to the county treasurer of the city and county of San Francisco prior to the 14th day of March, 1870.

X. That afterwards, to wit, on the 15th day of January, 1870, one David W. Connely presented to the board of supervisors of the city and

county of San Francisco his petition in writing, wherein he, among other things, set forth that he was, on the date of said petition, in possession of the tract of land last hereinbefore referred to and described in Exhibit A, attached to the complaint herein, and asking for a grant of said lands from said city and county to himself; that said petition did not set forth that said Connely, either by himself, his tenants,
96 or the person through whom he claimed or derived possession, was in possession of said land, or any part thereof, on the 8th day of March, 1866.

XI. That in truth and in fact the said David W. Connely was not, nor was any person or persons through whom he claimed or derived possession, in possession of the premises in said petition described, nor any part or parcel thereof, on the 8th day of March, A. D. 1866, or at any time previous to the spring of 1869.

XII. That after the presentation of said petition, the said David W. Connelly appeared before the clerk of said outside land committee, and introduced evidence tending to prove that he was in possession of said premises at the time of the presentation of said petition, but said Connely did not offer or introduce any evidence to show that he, or the person or persons through whom he claimed or derived possession, were, on the 8th day of March, A. D. 1866, in the possession of the land described in said petition, or any part thereof.

XIII. That the said Daniel Sweeney did not present his petition to the board of supervisors under the provisions of the act last aforesaid, because said Sweeney was not at the date of the passage of the said act, nor any time thereafter, in possession of said land, and said Sweeney could not have verified by oath a petition setting forth that he was so in possession.

XIV. That the board of supervisors of said city and county of San Francisco, upon the petition and evidence aforesaid, did adjudge and
97 award a grant, of said lands described in said petition, to the said David W. Connelly, and the mayor of the said city and county of San Francisco, in the year eighteen hundred and seventy, did execute, acknowledge, and deliver to the said David W. Connely deeds of conveyance of the tract of land described in the petition aforesaid, and did attach thereto the corporate seal of the said city and county of San Francisco; that the said David W. Connelly did, before the presentation of the petition aforesaid, pay to the tax collector of the city and county of San Francisco the amount assessed by the outside land committee upon the premises aforesaid, to pay for land reserved for public use, provided for in section 10 of order eight hundred, hereinbefore referred to, and also paid all taxes on said land for the five fiscal years preceding the year beginning July 1st, 1866, and all the taxes levied on said lands for State and municipal purposes, due and remaining unpaid at the date of said petition; that a portion, to wit, about twenty acres of the premises hereinbefore referred to, and described in Exhibit A, annexed to the complaint herein, were duly reserved by the city of San Francisco for public use, by authority of the act of Congress of March 8, 1866, hereinbefore referred to, and pursuant to the provisions of order number 800, approved and ratified by act of the legislature of the State of California, passed March 27th, 1868, hereinbefore referred to; that pursuant
98 to the act last aforesaid, and the order and regulations of the board of supervisors, the city and county of San Francisco did, on the day of , 1870, pay to said David W. Connely the sum of $20,000 as compensation for the land thus reserved for public use; that said last

named sum is greater than the aggregate amount of taxes and assessments paid by said Connely as aforesaid.

XV. That afterwards, to wit, on the 6th day of April, 1871, the said David W. Connely conveyed to one George F. Sharp a portion of the land thus conveyed to said Connely by the city and county of San Francisco as aforesaid.

XVI. That afterwards, to wit, on the day of January, 1872, the said David W. Connely departed this life, leaving a will; that on the 23d day of February, A. D. 1872, said will was duly admitted to probate in the probate court of the city and county of San Francisco; that by said will the defendant John H. Baird and one John S. Hager were named as the executors of said last will and testament, and all the estate of said decedent was devised to said executors upon certain trusts therein mentioned; that on the 23d day of February, 1872, the said Hager resigned his trust as such executor; that letters testamentary upon the estate of said Connely were, on the 26th day of February, 1872, duly issued to said Baird as sole executor by the probate court aforesaid; that by said last will and testament the said David W. Connely bequeathed all his real estate to his executors aforesaid; that the
99 defendants Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely (widow of John Connely, deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, and Samuel C. Stratton, claim some right or title in the estate of the said David W. Connely, deceased, as devisees, legatees, or cestuis que trustant, under the aforesaid will of said D. W. Connely, the exact nature and extent of which claims of said defendants is to plaintiff unknown.

XVII. That the defendants John H. Baird, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley Y. Luddington, C. Bonner, Mrs. Allison Bowers, the city and county of San Francisco, John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, Richard Styles second, are in and detain from this plaintiff the possession of said premises, and claim some right or interest in the premises aforesaid, derived from and under the said D. W. Connely; that the exact nature or extent of said claim plaintiff does not know and is unable to ascertain, but said plaintiff avers that said interest or claim of said defendants was acquired by them with full notice and knowl-
100 edge of the facts hereinbefore in this complaint set forth, and of the rights of the plaintiff and those under whom he claims and derives title to said premises.

101 XVIII. That this plaintiff, William Trenouth, through various mesne conveyances, did, before the commencement of this action, acquire, and now holds all the right, title, and interest and claim owned or held by the said Daniel Sweeney in and to the lands aforesaid, on the 8th day of March, 1866, and from thence hitherto.

Whereupon the defendants, upon the statement aforesaid, moved for a nonsuit against said plaintiff upon the ground—

First. That said Daniel Sweeney was not, at the time of the passage of the act of Congress aforesaid, in the bona fide possession of the lands in controversy, but was then a trespasser upon the possession of the defendants herein or their predecessors or grantors. That the judg-
102 ment of the court under which said Sweeney was ejected from

said premises, and the defendants herein, their predecessors or grantors, were put in possession thereof, was conclusive upon the point. That said Sweeney and his successor are estopped by that judgment.

Second. That said Sweeney was not one of the beneficiaries under the aforesaid act of Congress, because he had not paid the taxes and outside land assessment.

Third. That defendants, or their grantor Connely, having paid the taxes and outside land assessments, and having obtained a deed from the city, held it for themselves alone, and not as trustees for the plaintiff or said Sweeney.

Fourth. That no relation of trust or confidence had ever existed between said Connely or these defendants and said Sweeney or said plaintiff.

Whereupon, and after argument of counsel, said court granted said motion, and ordered that a judgment of nonsuit be entered against said plaintiff.

To which ruling and order of the court granting said motion and ordering said judgment of nonsuit, said plaintiff, by his counsel, then and there duly excepted, and now tenders this his bill of exceptions, praying that the same may be signed, sealed, and made a part of the record, which is done accordingly.

J. P. HOGE AND
D. M. DELMAS,
Attorneys for Plaintiff.

103 Service of the foregoing draft of a bill of exceptions accepted this 6th day of May, 1875, and I find it correct, and may be signed by the judge as correct.

S. M. WILSON,
Att'y for Def'ts.

I certify that the foregoing bill of exceptions has been settled and is now allowed.

S. B. McKEE,
Dist. Judge.

Dated June 10, 1875. Rec'd May 6, 1875.

Endorsed.
Filed June 12, 1875.

WM. HARNEY, *Clerk*,
By COLIN M. BOYD,
Dep. Clk.

J. P. HOGE AND
D. M. DELMAS,
Attorneys for Plaintiff.

Stipulation.

(Title of court and cause.)

It is hereby stipulated that, on the 24th day of September, A. D. 1875, plaintiff's motion for a new trial came on regularly to be heard, and was submitted without argument, and that thereupon, and on the same day, said motion was denied; to which ruling plaintiff then and there

excepted. It is further stipulated that this stipulation may be used in the record, on appeal, instead of said order.

WILSON & WILSON,
Att'ys for Def'ts.
HUNT & RISING,
Att'ys for Geo. F. Sharp.

Dated Nov. 18, 1875.

104 *Undertaking on appeal.*

(Title of court and cause.)

Whereas the plaintiff in the above-entitled action has appealed, or is about to appeal, to the supreme court of the State of California from a judgment made and entered against him in said action in the said district court in favor of the defendants in said action on the 26th day of April, A. D. 1875, dismissing plaintiff's complaint and nonsuiting the plaintiff, and for sixteen (16) dollars costs of suit, and from the order of said court, made and entered against the plaintiff on the 24th day of September, A. D. 1875, refusing to grant a new trial herein:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, William Trenouth, of the county of Santa Clara, State of California, and Charles C. Judson, of the city and county of San Francisco, State aforesaid, and Henry C. Judson, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

WILLIAM TRENOUTH. [SEAL.]
CHARLES C. JUDSON. [SEAL.]
HENRY C. JUDSON. [SEAL.]

105 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Charles C. Judson and Henry C. Judson, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is a resident and freeholder within this State, and is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHARLES C. JUDSON.
HENRY C. JUDSON.

Subscribed and sworn to before me this 17th day of November, 1875.

WILLIAM HARNEY,
County Clerk, San Francisco.

(Endorsed:) Filed Nov. 18, 1875. Wm. Harney, clerk, by Colin M. Boyd, dep. clerk.

Notice of appeal.

(Title of court and cause.)

You will please take notice that the plaintiff in the above entitled action hereby appeals to the supreme court of this State from the judg-

ment therein made and entered in the said district court on the 26th day of April, A. D. 1875, in favor of the defendants and against the
106 plaintiff, dismissing plaintiff's complaint and nonsuiting the plaintiff, and for sixteen dollars costs of suit, and from the whole thereof, and from the order made and entered herein on the 24th day of September, 1875, refusing to grant the application for a new trial herein, and from the whole thereof.

Dated 17th day of November, 1875.

Yours,

CURREY & EVANS,
Att'ys for App'l't.

To the clerk of said district court, and to S. M. Wilson, attorney for respondents and defendants, W. C. Burnett, attorney for defendant the city and county of San Francisco, Hunt & Rising, attorneys for defendant George F. Sharp.

(Endorsed:)

Service of the within notice admitted this 18th day of November, A. D. 1875.

WILSON & WILSON,
Att'ys for Def'ts.
W. C. BURNETT,
Att'ys for Def'ts.
HUNT & RISING,
Att'ys for Geo. F. Sharp.

(Endorsed:) Filed Nov. 18, 1875. Wm. Harney, clerk, by Colin M. Boyd, dep. clerk.

Stipulation.

It is hereby stipulated that the foregoing is a correct transcript of the pleadings, proceedings, bill of exceptions, and notice of appeal in the action the title of which is set forth at the beginning of the foregoing complaint.

WILSON & WILSON,
Att'ys for some Resp'd'ts.
W. C. BURNETT,
Att'ys for Def't the City & Co. of S. F.
HUNT & RISING,
Att'ys for Def't G. F. Sharp.

107 I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the transcript on appeal, filed in my office on the 13th day of January, 1876, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of March, A. D. 1877.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

Service of a copy of within transcript on appeal is hereby admitted this 10th day of January, 1876.

WILSON & WILSON,
Att'ys for certain Def'ts and Respondents.
W. C. BURNETT,
Att'y for Resp'd't the City & Co. of S. F.
HUNT & RISING,
Att'ys for Def't Sharp.

108 In the supreme court of the State of California, January term, A. D. 1877. On appeal from the district court of the 3d judicial district, in and for the city and county of San Francisco.

WM. TRENOUTH, APPELLANT,
vs.
JOHN H. BAIRD, EX'R, ETC., ET AL., RESPONDENTS. } No. 5014.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court from the bench.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order denying a new trial of the district court of the 3d judicial district, in and for the city and county of San Francisco, in the above entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 1st day of March, A. D. 1877, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 30th day of March, A. D. 1877.

[SEAL.]

D. B. WOOLF, *Clerk.*
By H. P. BUSH, *Deputy.*

109 In the Supreme Court of the United States.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR,
vs.
JOHN H. BAIRD, JOHN H. BAIRD, EXECUTOR of the last will and testament of David W. Connely (deceased), George F. Sharp, Robert Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, Cynthia Ann Connely, widow of John Connely (deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, William C. Watson, Harley Y. Luddington, C. Bonner, Mrs. Allison Bowers, The City and County of San Francisco, defendants in error.

Know all men by these presents that I, William Trenouth, of the county of Santa Clara, and B. B. Newman and Tully R. Wise, as sureties, of the city and county of San Francisco, in the State of California,
110 are held and firmly bound unto John H. Baird, John H. Baird (executor of the last will and testament of David W. Connely, deceased), George F. Sharp, Robert Connely, Otis Brown, Eliza Ann Suth-

erland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, Cynthia Ann Connely (widow of John Connely, deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, William C. Watson, Hurley Y. Luddington, C. Bonner, Mrs. Allison Bowers, the City and County of San Francisco, of the same place, in the sum of one thousand dollars, to be paid to the said John H. Baird, John H. Baird (executor of the last will and testament of David W. Connely, deceased), George F. Sharp, Robert Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, Cynthia Ann Connely (widow of John Connely, deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, William C. Watson, Harley Y. Luddington, C. Bonner, Mrs. Allison Bowers, the City and County of San Francisco, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally,
111 and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 14th day of March, 1877.

Whereas the above named William Trenouth has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such that, if the above named William Trenouth shall prosecute his said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAM TRENOUTH. [SEAL.]
B. B. NEWMAN. [SEAL.]
TULLY R. WISE. [SEAL.]

Sealed and delivered in presence of—
JOS. F. O'BEIRNE.

STATE OF CALIFORNIA,
City & County of San Francisco, ss:

B. B. Newman and Tully R. Wise, being severally duly sworn; depose and say, and each for himself deposes and says that he is one of
112 the sureties named in and who subscribed the foregoing obligation; that he is worth double the amount named in said obligation as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

B. B. NEWMAN.
TULLY R. WISE.

Subscribed and sworn to before me this 14th day of March, 1877.
[SEAL.] JOS. F. O'BEIRNE,
Deputy Clerk and Commissioner of U. S. Circuit Court, District of California.

The within bond is hereby approved this 14th day of March, 1877.

WM. T. WALLACE,
Chief Justice of the Supreme Court of the State of California.

(Endorsed:) In the Supreme Court of the United States. William Trenouth, plaintiff in error, vs. John H. Baird et al., defendants in error. Bond for costs and damages on prosecution of writ of error. Filed March 14, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond filed in my office on the 14th day of March, 1877, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of March, A. D. 1877.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

113 In the supreme court of the State of California.

WM. TRENOUTH, PLAINTIFF & APPELLANT,
vs.
JOHN H. BAIRD ET ALS., DEFENDANTS & RESPONDENTS.

We hereby authorize the substitution of W. W. Foote as attorney of record in the above-entitled cause for plaintiff and appellant. March 7th, 1877.

CURREY & EVANS,
Attorneys for Appellant.

(Endorsed:) 5014. In the supreme court of the State of California. William Trenouth, plaintiff & appellant, vs. John H. Baird et al., def'ts & respondents. Substitution of attorneys for the plaintiff and appellant. Filed March 14, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify, that the preceding and annexed is a true and correct copy of the substitution of attorney, filed in my office March 14, 1877, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 30th day of March, A. D. 1877.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

114 In the supreme court of the State of California.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR,
vs.
JOHN H. BAIRD, JOHN H. BAIRD, EXECUTOR of the last will and testament of David W. Connelly (deceased,) George F. Sharp, Robert Connelly, Otis Brown, Eliza Ann Sutherland, Samuel Connelly, Israel D. Haines, Robert Haines, Samuel Haines, Cynthia Ann Connelly, widow of John Connelly (deceased), Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, John S. Hager, Benjamin Smith, Samuel C. Stratton, Eugene L. Sullivan, Ogden
115 Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, William C. Watson, Harley Y. Luddington, C. Bonner, Mrs. Allison Bowers, the City and County of San Francisco, defendants in error.

Assignment of errors to be returned with the writ of error, to the Supreme Court of the United States.

The plaintiff in error now assigns for error the errors of the district court of the third judicial district of the State of California, in and for the city and county of San Francisco, in its order granting the motion of the defendants in error, for a non-suit against the plaintiff in error, on the trial of this action therein, on the grounds set forth and stated in said motion, or upon any other grounds; and the said district court erred in rendering judgment upon said motion, and order in favor of the defendants in error, and against the plaintiff in error. And
116 the supreme court of the State of California erred in rendering judgment affirming said order, and judgment of the said district court, and the rendition of said judgement of the said supreme court of the State of California is now assigned for error by said plaintiff in error.

Wherefore the plaintiff in error prays that the judgment of the supreme court of the State of California may be reversed with costs, and that it may be directed and instructed by this court to direct and instruct the said third district court, whose judgment the said supreme court affirmed herein, to reverse its said judgment and to render judgment for the plaintiff therein, upon such terms and conditions as this honorable court may direct and as to justice and equity may appertain, and for such other and further relief in the premises as the plaintiff in error is equitably entitled to.

San Francisco, April 10th, 1877.

W. W. FOOTE,
Attorney for the Plaintiff in Error.

(Indorsed:) 5014. Supreme Court of the United States. William Trenouth, plaintiff in error, vs. John H. Baird et al., defendants in error. Assignments of error by plaintiff in error. Filed April 23, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy. W. W. Foote, att'y pl'ff in error.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, between William Trenouth, plaintiff in error, and the City and County of San Francisco, John H. Baird, John H. Baird, executor of the last will and testament of David W. Connely, deceased, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, William Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, George F. Sharp, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Nerissa C. Whitney, Harley W. Luddington, Mrs. Allison Bowers, William C. Watson, R. Bonner, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of March, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

The above writ of error is hereby allowed.

WM. T. WALLACE,
Chief Justice of the Supreme Court of the State of California.

Attest, &c.:

L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Dist. of Cal.,
By J. T. O'BEIRNE,
D'p'y Clk.

(Indorsed:) 5014. United States Supreme Court. Wm. Trenouth vs. Jno. H. Baird et al. Writ of error. Filed March 14th, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

118 In the Supreme Court of the United States of America.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR,
vs.
JOHN H. BAIRD ET AL., DEFENDANTS IN ERROR.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

James Smith, being duly sworn, deposes and says that he is over

fourteen years of age, and competent to be a witness on the trial of the above entitled action. That on the 14th day of March, 1877, I served the citation in the above entitled action on S. M. Wilson, esq., Hunt & Rising, esqrs., and W. C. Burnett, esq., the attorneys for each and every of the defendants in error in the above entitled action, at the city and county of San Francisco, State of California, by delivering to and leaving with said S. M. Wilson, Hunt & Rising, and W. C. Burnett, and to each of them personally, a copy of said citation issued and filed in said action.

JAMES S. SMITH.

Subscribed and sworn to before me this 15th day of March, A. D. 1877.

JOS. T. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

(Indorsed:) Supreme Court of the United States of America. William Trenouth, pl'ff in error, vs. John H. Baird et al., def't' in error. Affidavit for service of citation.

119 UNITED STATES OF AMERICA, *ss:*

To the City and County of San Francisco, John H. Baird, John H. Baird, executor of the last will & testament of David W. Connely, deceased, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, William Stratton, Robert A. Stratton, Samuel C. Stratton, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, George F. Sharp, John R. Sharpstein, Clinton A. Edson, James D. Witney, Nerissa C. Witney, Harley W. Luddington, Mrs. Allison Bowers, William C. Watson, and R. Bonner, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington in the District of Columbia, on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein William Trenouth is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable William T. Wallace, chief justice of the supreme court of the State of California, this 14th day of March, A. D. 1877, and of the Independence of the United States the 101st.

WM. T. WALLACE,
Chief Justice of the Supreme Court of the State of California.

120 Due service of the within citation hereby admitted upon us and each of us this 14th day of March, A. D. 1877, and of a copy thereof.

WILSON & WILSON,
Attorneys for John H. Baird et al.
HUNT & RISING,*
Attorneys for George F. Sharp.
W. C. BURNETT, JR.,
Attorney for the City and County of San Francisco.

* In pencil in the original.

(Indorsed:) 5014. United States Supreme Court. Wm. Trenouth vs. John H. Baird, ex'r, &c. Citation. Filed March 15th, 1877. D. B. Woolf, clerk, by H. P. Bush, deputy.

121 In the supreme court of the State of California.

WM. TRENOUTH
vs.
JOHN H. BAIRD ET AL. } No. 5014.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing documents and papers are and constitute a true copy and transcript of the record and of all the proceedings in the above-entitled cause, as the same appear upon the records and files of said court in my office.

And I do further certify that on the 14th day of March, 1877, the plaintiff in error filed in this court a writ of error (herewith transmitted) duly allowed by the Hon. Wm. T. Wallace, chief justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of said writ of error for the defendants in error, and also on the 15th day of March, 1877, filed a citation (herewith transmitted) purporting to have been served upon the attorneys for the said defendants in error, and also, on the 14th day of March, 1877, filed in my office a bond in the sum of one thousand ($1,000) dollars (a copy of which is hereto annexed), with sureties approved by the chief justice of this court, conditioned that said plaintiff in error shall prose-
122 cute his said writ of error to effect and answer all costs and damages if he fail to make good his plea. And that said plaintiff in error on the 23d day of April, 1877, filed in my office his assignment of error herewith transmitted.

Witness my hand and the seal of the court this 24th day of April, A. D. 1877.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

(Indorsement on cover:) No. 141. William Trenouth, plaintiff in error, vs. The City and County of San Francisco, John H. Baird, et al. California sup. court. Filed 3rd May, 1877.

IN THE

Supreme Court of the United States.

No. 141.—October Term, 1879.

William Trenouth, Plaintiff in Error,

vs.

The City and County of San Francisco, John H. Baird, et al., Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

WALTER VAN DYKE,

Counsel for Plaintiff in Error.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR, *vs.* THE CITY AND COUNTY OF SAN FRANCISCO, JOHN H. BAIRD, ET AL., DEFENDANTS IN ERROR.	No. 141.

Brief of Plaintiff in Error.

This is a writ of error to the Supreme Court of the State of California.

The action concerns a tract of land, described in the complaint, lying within the city and county of San Francisco, and without the limits of the city of San Francisco, as defined in the act to incorporate said city, passed by the legislature of the State of California, on the 15th day April, A. D. 1851. Said land being a portion of the tract the title to which, on the part of the United States, was relinquished and granted to the said city and its successors by act of Congress, approved March 8th, 1866, subject to certain trusts and conditions therein mentioned.

14 Stat., p. 4.

The plaintiff in the state court, and in error here, claims as one of the beneficiaries under that act, and the facts nec-

essary to bring him within its provisions are stated in his complaint. It is averred therein that on the 8th day of March, 1866, the United States was the owner and holder of the legal title to certain lands in said city and county of San Francisco, embracing the lands in controversy, and that on that day Congress passed the act referred to.

Fol. 4.

That on the 14th day of January, 1868, for the purpose of carrying out the trusts imposed upon said city of San Francisco by the aforesaid act of Congress, the board of supervisors of the city and county of San Francisco passed an order entitled "Order, No. 800—An order for the settlement and quieting of titles to land in the city and county of San Francisco, situate above high-water mark of the bay of San Francisco and the Pacific Ocean, and without the corporate limits of the city of San Francisco," being the same lands embraced within said act of Congress. Setting forth the provisions of said order or ordinance, and alleging that the legislature of the State of California, on the 27th day of March, 1868, ratified and confirmed the order aforesaid, and all acts which then had or might thereafter take place under its provisions.

Fols. 5 to 9.

That on the 14th day of March, 1870, the legislature of California passed an act entitled "An act to expedite the settlement of land-titles in the city and county of San Francisco, and to ratify and confirm the acts and proceedings of certain of the authorities thereof," stating in substance the provisions of said act.

Fols. 10 to 12.

The first section of said act reads as follows: "Upon re-
'ceiving a petition from any person or persons, claiming
'that they, by themselves, their tenants, or the persons
'through whom they claim or derive possession, have been,
'from and including the eighth day of March, Anno Domini
'eighteen hundred and sixty-six (1866), and still are, in the
'possession of any of the lands without the corporate limits

'of the city of San Francisco, as defined in an act to incor-
'porate said city, passed by the legislature of the State of Cali-
'fornia, on the fifteenth day of April, Anno Domini eighteen
'hundred and fifty-one (1851), and described in the decree of
'Justice Field, of the United States Circuit Court, confirming
'the claim of the city and county of San Francisco, entered
'November second, Anno Domini eighteen hundred and
'sixty-four (1864), in the Circuit Court of the United States for
'the Northern District of the State of California, and that they,
'or the persons through whom they claim or derive posses-
'sion, have paid to the tax collector of the city and county
'of San Francisco the amount assessed by the outside land
'committee upon the land described in said petition, to pay
'for land reserved for public use, provided for in section
'ten (10) of order eight hundred (800), and also paid the
'taxes mentioned in section four (4) of said order, and all
'the taxes levied on said lands for state and municipal pur-
'poses now due and remaining unpaid; or, upon receiving a
'petition from any person or persons, setting forth that said
'petitioners, by themselves, their tenants, or the persons
'through whom they claim or derive possession, were, on
'or before the first (1st) day of January, Anno Domini
'eighteen hundred and fifty-five (1855), to and including the
'twentieth (20th) day of June, Anno Domini eighteen hun-
'dred and fifty-five (1855), and still are, in possession of the
'land described in said petition, embraced within the cor-
'porate limits of the city of San Francisco, and above high-
'water mark, as defined in the act to incorporate said city,
'passed by the legislature of the State of California, on the
'fifteenth (15th) day of April, Anno Domini eighteen hun-
'dred and fifty-one (1851); and such petition in either case
'setting forth that such lands have not been sold, leased,
'dedicated, reserved, or conveyed by authority of the said
'city and county of San Francisco, or the United States, to
'any one, or for any purpose, and asking for a grant from
'said city and county, the board of supervisors shall proceed
'to act thereon as hereinafter provided. This petition shall

'be verified by the oath or affirmation of the party in whose 'behalf the petition is presented, or by some one acting as 'his agent, and conversant with the facts detailed in the 'petition."

That one Daniel Sweeney, the grantor of the plaintiff, was, on the 8th day of March, 1866, in the bona fide actual possession of the land described in the complaint, stating the particulars of such possession, and other facts sufficient to bring said Sweeney within the provisions of the act of Congress and the act of the legislature of California of 1868, before referred to.

Fol. 13.

The granting of the land in question by the city, under the act of the legislature of California of 1870, to one David M. Connely, who, it is alleged, was not, nor was any person through whom he claimed or derived possession, in the possession of said premises on the 8th day of March, 1866, or at any time previous to the spring of 1869; and the reason why said Sweeney did not present his petition to the board of supervisors of said city and county, to wit: That he was not in possession of said lands at the date of the passage of last-mentioned act of the legislature, and could not have verified by oath a petition setting forth that he was so in possession, but that said Sweeney was ready and willing, and offered to comply with the said order and act of the legislature ratifying the same; that the portion of said lands taken for public uses in pursuance of said ratified order of the board of supervisors was valued at twenty thousand dollars ($20,000), and paid over to said Connely, who so obtained the title to the remainder, and that such sum was more than the amount of taxes and assessments paid by him on said land.

Fols. 15–16.

That afterward Connely conveyed to defendant George F. Sharp a portion of the land so conveyed by the city to him, and that in January, 1872, he departed this life, leaving a will, and that letters testamentary upon his estate

were issued to defendant John H. Baird, defendants Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Southerland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, and Samuel C. Stratton claiming as devisees, legatees, &c., and that the other defendants claim some right or interest in the premises, derived from and under said Connely, but who, it is alleged, acquired their interest or claim with full notice and knowledge of the rights of the plaintiff and those under whom he claims, and that the title of the defendants is subject in their hands to the trust and equities with which it was charged while in Connely. That said Sweeney, as the beneficiary under the act of Congress, approved March 8th, 1866, upon the passage of the act of the state legislature ratifying the order No. 800, became vested with the title and claim of the city as the grantee under said act of Congress, and was entitled to receive from said city a deed of conveyance upon the payment of the assessments and taxes provided for in said order, which he was ready, willing, and offered to pay, but that said Connely, contriving to wrong and defraud him by the false pretences, allegations, and proofs as set forth in the complaint, did, in his own name and for his own benefit, obtain a conveyance from said city, and praying that defendant Baird, executor of Connely, be decreed to hold whatever title Connely may have acquired by the conveyance from the city in trust for the plaintiff, and that said executor convey the same to the plaintiff; that the plaintiff be decreed to be the owner of said land, and to recover the possession thereof from the defendants.

Fols. 19–21.

The answer on the part of the city denies, upon information and belief, the possession, occupation, and acts of Sweeney, alleged in the complaint as entitling him to the benefit of the act of Congress and the legislature of the state

thereunder; and upon like information and belief denies the allegation that Connely did not comply with the requirements of said act of Congress and act of the legislature, and that he was not entitled to a conveyance from the city.

Fols. 23–28.

The defendant Baird, for himself and as executor of Connely, and the defendants, said heirs and devisees of Connely, in their answer also deny the possession, occupation, and various acts and things done and performed by said Sweeney, as alleged in the complaint, as entitling him to the benefit of said act of Congress and act of the legislature of the state thereunder, and aver that defendants Baird, Hager, Sullivan, and their tenants-in-common, Charles K. Smith, Isaac S. Roberts, and Wm. C. Walker, in May, 1863, were in the possession of the said premises, and were ousted therefrom by said Sweeney and others, and that in September, 1865, the said defendants Baird, Hager, Sullivan, and their said co-tenants, commenced an action in the 4th district court of said state against said Sweeney and others to recover the possession thereof; that Sweeney appeared and answered, and thereafter said action came on for trial and judgment was rendered in favor of said plaintiffs therein, and against said Sweeney and others; and that upon appeal the supreme court of the state affirmed said judgment, and in September, 1869, the remittitur went down and the plaintiffs in said action were put in possession and said Sweeney ejected therefrom; and said defendants claim that by virtue of said judgment said Sweeney and his grantee, the plaintiff, are estopped from proceeding herein.

Folios 34–39.

That the plaintiff in said action thereafter, and before Connely presented his petition to the city authorities, conveyed to said Connelly.

Folio 43.

"And defendants admit and aver that a part of said land 'described in Exhibit A, annexed to the complaint, to wit, 'about twenty acres, were reserved by said city and county

'for public uses as a park, by authority of acts of Congress 'and of said legislature, and orders and ordinances of said 'city and county, and that pursuant thereto said city and 'county did pay to said Connely the sum of twenty thou- 'sand dollars ($20,000) as compensation for lands reserved 'for public uses; and the said last-named sum is greater 'than the amount of taxes paid on said land by said Connely."

Folio 46.

And said defendants aver that they claim said premises in their own right respectively, "and that their said claim and right and title is in part derived from said Connely."

The answer of said defendant Sharp avers that the portion of the land conveyed to him by Connely he was entitled to in his own right from the city, and that Connely was not entitled thereto, but included it in his petition and claim by mistake, and that it was agreed between them that Sharp should allow Connelly to obtain the title from the city and thereafter convey the same to Sharp, which was done, but, it is averred, that he, Sharp, derived no title by reason of said conveyance made by Connely.

Folios 56–59.

The answer of the remaining defendants, Sharpstein and others, fols. 58 to 82, contains the same denials and averments substantially as the answer of defendants Baird and others, already noticed. These defendants also claim under Connely.

Fol. 81.

The cause came on for trial before the said District Court of the State of California, holden in and for the city and county of San Francisco, April 26th, 1875, whereupon the plaintiff, at the request of the court, stated the facts upon which he relied and which he expected to prove in support of said action.

Bill of Exceptions, fol. 84 to 101.

The portion of the statement to fol. 93, being subdivisions I., II., III., IV., V., and VI., consists in the main of the un-

controverted facts set forth in the complaint in reference to the corporate character of the city and county of San Francisco, the passage of the act of Congress of March 8th, 1866, and the act of the state legislature of 1868 ratifying the municipal order No. 800, giving the substance of said order, and the subsequent act of the state legislature of 1870, and giving its substance. Then follows this statement of facts:

"That on the 8th day of March, 1866, one Daniel Sweeney was in the bona fide actual possession of that portion of the lands hereinbefore mentioned as granted by the Congress of the United States of America, as aforesaid, to the city and county of San Francisco, which is described in the complaint herein; that the said premises had been and were vacant and unoccupied from the time of the cession of the State of California to the United States until the 11th day of April, A. D. 1863; that on the day last aforesaid, one Daniel Sweeney was a citizen of the United States, over twenty-one years of age, the head of a family, and entitled to all the benefits of the pre-emption laws of the United States; that on the said day the said Sweeney, being desirous of availing himself of the benefits of the said pre-emption laws, went upon the premises aforesaid, enclosed them with a substantial fence, and built a dwelling-house upon the same; that after having taken possession of said premises as aforesaid, said Sweeney continued to occupy and reside upon the same; that upon the 14th day of May, 1863, said Sweeney duly filed his pre-emption claim to said premises in the United States land office at San Francisco; that in the fall of said year 1863 the said Sweeney cultivated said premises and used them for the pasturage of cattle, and so continued to cultivate and use the same until the year 1869; that said Sweeney, together with his family, has continuously and uninterruptedly occupied and resided upon said premises from the fall of 1863 until the spring of 1869, when he was ejected from the same, making the same his home and that of his family,

'claiming the same in good faith as his property, and en-
'joying the sole, exclusive, and peaceable possession thereof.
'That said Sweeney was so ejected by virtue of a writ
'of restitution issued out of the Fourth Judicial District
'Court in and for the City and County of San Francisco,
'upon a judgment of said court, rendered in an action
'of ejectment to recover the possession of said premises.
'That in said action John H. Baird, Eugene L. Sullivan,
'and the other defendants in this present action, or their
'grantors and predecessors in interest, were plaintiffs, and
'said Daniel Sweeney and others were defendants; that
'said action was commenced on the 11th day of September,
'1865; that said judgment was originally rendered by said
'district court on the 6th day of April, 1867, and was af-
'firmed by the supreme court of this state at the April term,
'1869; that said writ of restitution was issued on the third
'day of September, 1869, and executed on the fourth day
'of September, 1869. But by virtue of said writ said de-
'fendants, or their predecessors or grantors, were placed in
'possession of said premises. That the only question liti-
'gated in said action of ejectment was the question of prior
'possession in the plaintiffs in said action, and that the title
'which said Sweeney may have had by virtue of the
'act of Congress and the various orders of the board of
'supervisors, and the acts of the legislature hereinabove
'referred to and the facts hereinabove stated, was in no
'way litigated or brought before the court in said action.

"That previous to the first day of April, 1868, all taxes
'which had been assessed upon said land during the five
'fiscal years preceeding the year beginning July first,
'eighteen hundred and sixty-six, were paid.

"That the amount assessed upon said land by the com-
'mittee, designated as the 'Outside Land Committee,' pro-
'vided for in the order of the board of supervisors, herein-
'before referred to, were paid to the county treasurer of the
'city and county of San Francisco, prior to the 14th day of
'March, 1870.

"That afterwards, to wit, on the 15th day of January, '1870, one David W. Connely presented to the board of supervisors of the city and county of San Francisco his petition 'in writing, wherein he, among other things, set forth that 'he was, on the date of said petition, in possession of the 'tract of land last hereinbefore referred to and described in 'Exhibit A, attached to the complaint herein, and asking 'for a grant of said lands from said city and county to himself; that said petition did not set forth that said Connely, 'either by himself, his tenants, or the person through whom 'he claimed or derived possession, was in possession of said 'land, or any part thereof, on the 8th day of March, 1866.

"That in truth and in fact the said David W. Connely, 'was not, nor was any person or persons through whom he 'claimed or derived possession, in possession of the premises in said petition described, nor any part or parcel 'thereof, on the 8th day of March, A. D. 1866, or at any 'time previous to the spring of 1869.

"That after the presentation of said petition, the said 'David W. Connely appeared before the clerk of said Outside Land Committee, and introduced evidence tending to 'prove that he was in possession of said premises at the 'time of the presentation of said petition, but said Connely 'did not offer or introduce any evidence to show that he, 'or the person or persons through whom he claimed or derived possession, were, on the 8th day of March, A. D. '1866, in the possession of the land described in said petition, or any part thereof.

"That the said Daniel Sweeney did not present his petition to the board of supervisors under the provisions of the 'act last aforesaid, because said Sweeny was not at the date 'of the passage of the said act, nor any time thereafter, in 'possession of said land, and said Sweeney could not have 'verified by oath a petition setting forth that he was so in 'possession."

Then follows the statement that the board of supervisors of the city and county, upon the petition and evidence of

Connely as aforesaid, issued to him a deed of conveyance for the tract described in the petition on which Connely paid all the taxes and assessments required by the provisions of said order, but that the city paid to Connely for the portion of said land reserved for public use, twenty thousand dollars ($20,000), which was a greater sum than the aggregate of taxes and assessments paid by him.

Fols. 97–98.

That the defendants derive their title from and claim under Connely, but that said interest or claim was acquired by them with full notice and knowledge of the facts stated and of the rights of the plaintiff and those under whom he claims.

That the plaintiff through mesne conveyances, before the commencement of the action, acquired all the right and title of said Sweeney.

Fols. 99–101.

Upon this statement the defendants moved for a nonsuit, upon the grounds:

"First. That said Daniel Sweeney was not, at the time 'of the passage of the act of Congress aforesaid, in the bona 'fide possession of the lands in controversy, but was then a 'trespasser upon the possession of the defendants herein or 'their predecessors or grantors. That the judgment of the 'court under which said Sweeney was ejected from said 'premises, and the defendants herein, their predecessors or 'grantors, were put in possession thereof, was conclusive 'upon the point. That said Sweeney and his successor are 'estopped by that judgment.

"Second. That said Sweeney was not one of the benefi- 'ciaries under the aforesaid act of Congress, because he had 'not paid the taxes and outside land assessment.

"Third. That defendants, or their grantor, Connely, hav- 'ing paid the taxes and outside land assessments, and hav- 'ing obtained a deed from the city, held it for themselves 'alone, and not as trustees for the plaintiff of said Sweeney.

"Fourth. That no relation of trust or confidence had ever 'existed between said Connely or these defendants, and 'said Sweeney or said plaintiff."

The court, after argument, granted the motion and ordered that a judgment of non-suit be entered against the plaintiff, to which ruling and order the plaintiff then and there duly excepted.

Fols. 102–103.

Subsequently, in September, 1875, a motion for a new trial was made and submitted, which motion the court denied.

Fol. 103.

Thereupon an appeal was taken by the plaintiff to the supreme court of the state from said judgment of non-suit, and also from the order refusing a new trial.

Fol. 106.

And the supreme court of the state, at the January term thereof, 1877, to wit, on the first day of March, 1877, affirmed the said judgment and order denying a new trial of the said District Court of the Third Judicial District of said state.

Fol. 108.

The plaintiff thereupon sued out this writ of error, March 14th, 1877, and assigns for error the errors of said district court in granting said motion of non-suit, on the grounds stated, or on any grounds, and in rendering judgment in favor of defendants and against the plaintiff, and the error of the Supreme Court of the State of California in affirming said order and judgment.

Fols. 115, 116, 117.

All the facts contained in the plaintiff's opening statement on the trial, and embraced in the bill of exceptions already noticed, must be taken as true. The defendants' motion for non-suit in the statement, like a demurrer to a complaint, necessarily, for that purpose, admitted the facts

as stated. In granting the motion and awarding judgment for the defendants it is fair to assume the trial court based its decision upon one or more of the propositions contained in the motion, and that the state supreme court, in affirming said judgment, did the same.

The plaintiff in error maintains the opposite of these propositions, and will take them up *seriatim* in the points following:

I.

In the first ground on which the non-suit was moved it is averred that Sweeney, the plaintiff's grantor, was not, at the time of the passage of said act of Congress, in the bona fide possession of the lands in controversy, but was a trespasser, &c., notwithstanding the record distinctly shows, as a fact admitted, that he was in such bona fide possession at that date. But it is claimed the judgment of the court under which Sweeney was ejected is conclusive against him on this point. It is true that in California, the fiction attending the proceeding in ejectment never having existed, the courts have, from an early date, held that a judgment in ejectment stood upon the same footing as a judgment in other actions; that is, it works an estoppel as to the matters put in issue and tried.

Caperton vs. Schmidt, 26 Cala., 479–494.

It appears from the record in this case "that the only 'question litigated in said action of ejectment was prior 'possession of the plaintiffs in said action, and that the title 'which Sweeney may have had by virtue of the act of Con-'gress and the various orders of the board of supervisors, 'and the act of the legislature hereinbefore referred to, and 'the facts hereinbefore stated, was in no way litigated or 'brought before the court in said action."

This, therefore, completely negatives the assumption contained in said first ground of defendants' motion and must control. As the judgment roll in such action is not in this record, nor anything else to show what was litigated, ex-

cept such statement. The action against Sweeney was instituted long before the passage of the act of Congress, and at the time of the trial, final judgment, and eviction of Sweeney thereunder, the legal title remained in the city; it had not yet been "disposed of or conveyed by said city," as in said act directed. The claim of Sweeney during the litigation was only an equitable title. He was a cestui que trust, the city being the trustee and holding the legal title for his use, and subject to convey to him upon such terms and conditions as the legislature should prescribe. And although it is true that in California a defendant in ejectment *may* set up and have litigated an equitable title, yet he is not compelled to do so; and if such equitable claim or title be not so litigated, the judgment in ejectment does not estop the party holding such equity from afterwards litigating the subject-matter thereof.

This has been several times expressly decided by the supreme court of that state.

In *Hough vs. Waters*, 30 Cal., 311, the court says:

"We do not consider the question an open one in this 'state. The point was directly presented in Lorraine vs. 'Long, 6 Cal., 452, and it was held that although a party 'may set up an equitable defence to an action at law, he is 'not confined to that proceeding. He may let judgment go 'at law and file his bill in equity for relief. And it was 'further considered, while the practice act enlarges the 'field of remedy, that it does not take away pre-existing 'remedies by implication. This decision has been acquiesced in and acted on as settled law by the profession 'from the time it was rendered; and so far as we are advised, its correctness has never been the subject of judicial 'doubt. To reverse this decision at this late day would involve a sacrifice, not of this case merely, but presumably 'of many others instituted, or to be instituted, upon the faith 'that the decision would be adhered to."

And in McCreary vs. Casey, 45 Cal., 128, the judgment pleaded in bar was a case where an equitable defence had

been set up in the defendant's pleading, but not litigated, and it was held the judgment in such suit did not bar a subsequent action embracing the equitable defence.

The said judgment is not pleaded by defendant Sharp in bar or as an estoppel against the plaintiff. In his answer, defendant Sharp alleges that long prior to said deed of the city and county of San Francisco to said Connely, and said Connely to said Sharp, he was seized and possessed of said premises as the owner thereof, and that he derived no title by reason of the conveyance of Connely to him.

Fol. 57.

Connely derived whatever claim he held entirely from Baird and associates, who recovered the judgment against Sweeney; and Sharp disclaims having derived any additional title to the portion of the premises claimed by him from Connely, and does not connect himself at all with the parties who recovered the judgment which is pleaded in bar by the other defendants.

Therefore, upon the facts as stated in the bill of exceptions, there would seem to be no defence to the plaintiff's recovery as against the portion of the premises held by defendant Sharp.

II.

It is alleged, as the second ground for the non-suit, that Sweeney was not one of the beneficiaries under the aforesaid act of Congress, because he had not paid the taxes and outside land assessments.

The nature and character of the claim or title on the part of the city to the lands in question have been often discussed in this court as well as in the courts of California.

The claim of the Mexican pueblo, to which the city succeeded, was an imperfect one. It was a right which the government might refuse to recognize at all or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than

the four square leagues, which was the usual quantity assigned.

Even after the lands were assigned and measured, the interest acquired by the pueblo was far from being an indefeasible estate or title in fee. The interest amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation and to use the remainder for commons, for pasture-lands, or as a source of revenue, or for other public purposes, and this limited right of disposition and use was in all particulars subject to the control of the government of the country.

Grisar vs. McDowell, 6 Wall., 373.
Townsend vs. Greeley, 5 " 337.
Hart vs. Burnett, 15 Cala., 530.
Payne vs. Treadwell, 16 " 221.

While under the Mexican rule, a number of grants were made by that government to private parties of land within the limits of the pueblo, and various other acts of dominion and control exercised over these pueblo lands.

On the conquest of California by the United States, the latter succeeded to the rights and authority of the government of Mexico.

Merryman vs. Bourne, 9 Wall., 601.
Carr vs. United States, 98 U. S., 434.
Grisar vs. McDowell, 6 Wall., 373.

The decree of the Circuit Court for California confirming the pueblo claim excepts from the confirmation to the city parcels theretofore reserved or dedicated to public uses by the United States, and also private grants confirmed or then pending for confirmation, and concludes: "This con-'firmation is in trust, for the benefit of lot-holders under 'grants from the pueblo, town, or city of San Francisco, or 'other competent authority, and as to any residue, in trust 'for the use and benefit of the inhabitants of the city." Modified decree entered May 18th, 1865.

The lands that had been granted by the pueblo, town, or city of San Francisco were within the limits of the city, as defined in the act to re-incorporate said city, passed April 15th, 1851, and were embraced in and provided for by the ordinance commonly known as the "Van Ness Ordinance," adopted in 1855, and ratified by the state legisture in 1858.

The right and title of the United States to these lands were relinquished to the city by the 5th section of the act of Congress of July 1st, 1864, for the uses and purposes specified in said ordinance, with certain exceptions and reservations.

The land in controversy is a portion of the lands mentioned in the decree as the "residue," which were to be held in trust for the use and benefit of the inhabitants of the city. They are known as "outside lands," that is, outside the charter line of 1851.

Pending the appeal from the decision of the circuit court confirming the pueblo claim, Congress passed said act of May 8th, 1866, relinquishing and granting to the city all the right and title of the United States to all the lands embraced within the said decree of May 18th, 1865, to wit, the four square leagues: "Subject, however, to the reser-'vations and exceptions designated in said decree, and upon 'the following trust, namely, that all the said lands not 'heretofore granted in said city shall be disposed of and 'conveyed by said city to parties in the bona fide actual 'possession thereof by themselves or tenants on the passage 'of this act, in such quantities and upon such terms and 'conditions as the legislature of the State of California may 'prescribe, except such parcels thereof as may be reserved 'and set apart by ordinance of said city for public uses."

14 Stat., 4.

In Grisar vs. McDowell this court say: "In the execu-'tion of its treaty obligations with respect to property 'claimed under Mexican laws, the government may 'adopt such modes of procedure as it may deem expedi-'ent. It may act by legislation directly upon the claims

'preferred, or it may require their submission to the ordi-
'nary tribunals. It is the sole judge of the propriety of
'the mode, and having the plenary power of confirmation
'it may annex any conditions to the confirmation of a claim
'resting upon an imperfect right, which it may choose. It
'may declare the action of the special board final; it may
'make it subject to appeal; it may require the appeal to go
'through one or more courts, and it may arrest the action
'of board or court at any stage."

By this act the cause in court, for a confirmation, was arrested and the legal title was conveyed to the city by direct grant, in trust, however, as therein mentioned.

The appeal, therefore, was not prosecuted further and nothing was done under the decree of the circuit court, and no patent has issued, as contemplated under the acts of Congress of March 3d, 1851, and July 1st, 1864, upon a confirmed claim. But as to the land not theretofore granted to the city, the execution of the trust by the city was directed and controlled by conditions annexed to this grant. They should be disposed of and conveyed to parties in the *bona fide actual* possession by themselves or tenants on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state might prescribe; that is, terms and conditions, of course, not inconsistent with the terms and conditions contained in the act itself.

The bill of exceptions shows that Sweeney, the grantor of plaintiff, was, on the day named, in the bona fide actual possession of the land in controversy, and that Connely, under whom defendants (except Sharp) claim, was not, nor was any person through whom he claimed, in possession of said premises or any part thereof.

This being the fact, it is as though Congress had, in the act, in express terms, directed that the city should dispose of and convey to said Sweeney so much of the land as was so in his bona fide actual possession, on such other terms and conditions, not inconsistent with this direction, as the legislature might prescribe.

But it is claimed that Sweeney was not one of the beneficiaries under the aforesaid act of Congress, because he had not paid the taxes and outside land assessment.

The ordinance ratified by the legislature as aforesaid, for the disposal of these outside lands, provides for the subdivision of the same into blocks and lots and the selection and setting apart of portions thereof for a park and other public uses, and that the land so taken for public uses, other than for streets and highways, should be appraised and paid for to the parties entitled thereto, as such beneficiaries, and that an assessment should be made on the lands not so taken for the payment thereof. It also required the payment of taxes on said land for the five fiscal years preceding the year beginning July 1st, 1866. Supposing there were such terms and conditions as the legislature was authorized to prescribe—which, as to the payment of back taxes, we do not admit, as no tax could be levied by the state on these lands so as to interfere with their disposition—the record shows the conditions were complied with.

Of the land in the bona fide actual possession of Sweeney as aforesaid, a part was taken for public uses, and such portion so taken was appraised at $20,000, which sum was paid over to Connely, and that said sum was greater in the aggregate than the amount of taxes and assessment paid by Connely, and that said Connely paid all such taxes and assessments as required by said ordinance. The money paid over to Connely belonged to Sweeney, and the payment of the taxes and assessment by Connely inured to the benefit of Sweeney, leaving something still due him, after such payment, of the funds that so wrongfully went into the hands of Connely. Sweeney was, therefore, one of the beneficiaries under the aforesaid act of Congress.

III.

It is claimed that Connely, having paid the taxes and outside land assessments, and having obtained a deed from

the city, held in his own right and not as trustee of Sweeney, and that defendants or his grantees hold in the same manner.

It has been shown already that the taxes and assessments paid by him were more than covered by the $20,000 he received from the city in payment for lands taken from Sweeney and which did not belong to Connely.

Two years after the legislature of California passed the act ratifying said ordinance, prescribing terms and conditions for disposing of said trust lands to the beneficiaries under the act of Congress, to wit, March 14, 1870, the legislature of said state passed another act, section one of which is copied in the brief, in which new terms and conditions are prescribed.

By this act the claimant to any of these outside lands was required to present a petition to the board of supervisors, stating that he had been, prior to and including the 8th day of March, 1866, *and still was*, in the possession of said lands, that is, on March 14, 1870, and this was also required to be verified.

The bill of exceptions shows that Connely in his petition, among other things, set forth that he was, on the date of said petition, in possession of the tract of land in question, but that said petition did not set forth that said Connely, either by himself, his tenants, or the person through whom he claimed, was in possession on the 8th day of March, 1866, and that in truth and in fact said Connely was not, nor was any person through whom he claimed, in possession on said last-mentioned date; that Sweeney did not present his petition because he was not, at the date of said last-mentioned act of the legislature, in possession of said land, and could not have verified by oath his said petition setting forth that he was so in possession.

Fols. 90, 95, 96.

The legislature having, by the act of March 27, 1868, ratifying order 800, prescribed the terms and conditions by

which the beneficiaries, under the act of Congress, were to receive a legal title from the city for these trust lands, exhausted its power in the premises. Rights became vested on the passage of said act, and new terms and conditions could not thereafter be imposed so as to affect such rights.

Further, the provision in the act of March 14, 1870, requiring a verified petition from the claimant that he was at that date in possession, is in conflict with the act of Congress.

That act conveyed the legal title in trust for parties in possession on the 8th of May, 1866, and the state legislature cannot say they must be in possession on any other day, as a condition for receiving the benefit of the national grant.

Fisher vs. City of Benicia, 36 Cala., 562.
Fletcher vs. Peck, 6 Cranch, 87.
Montgomery vs. Casson (Kassan), 16 Cala., 189.
Grogan vs. San Francisco, 18 Cala., 590.
Dodge vs. Worley, 18 How., 337.

The plaintiff's grantor was entitled to the legal title to the premises in question prior to the act of the legislature of March 14th, 1870, and the terms of that act, as already shown, operated to prevent and excuse him (plaintiff's said grantor) from filing the petition required by that act, and possession by Connely in 1870, at the date of that act, and payment of taxes and assessments, did not entitle him to the conveyance from the city, even if such payment had been made out of his own funds, instead of being more than covered by the proceeds of land taken from Sweeney for public uses.

IV.

The city having conveyed the legal title to Connely, who was not the beneficiary under the act of Congress, the title so conveyed is held in trust for the party entitled thereto

under said act; and plaintiff having shown that his grantor was the beneficiary under said act, is entitled to a judgment as prayed for in his bill of complaint.

Wirth vs. Branson, 98 U. S., 118.
Stark vs. Starrs, 6 Wall., 402–419.
Lytle vs. The State of Arkansas, 9 How., 314.
Shepley vs. Cowan, 91 U. S., 330.

WALTER VAN DYKE,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 141.

WILLIAM TRENOUTH,

Plaintiff in error,

vs.

JOHN H. BAIRD, Executor of the last Will and Testament of David W. Connely, deceased; Geo. F. Sharp, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, widow of John Connelly, deceased; Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John H. Baird, John S. Hager, Benjamin Smith, Euguene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley Y. Ludington, C. Bonner, Mrs. Allison Bowers, The City and County of San Francisco, John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, Richard Styles second,

Defendants in error.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief for Defendants in Error.

EDMOND L. GOOLD,
Of Counsel.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM TRENOUTH, *Plaintiff in error,*

vs.

JOHN H. BAIRD, Executor of the last Will and Testament of David W. Connely, deceased; Geo. F. Sharp, Robert Connely, Arthur C. Connely, Otis Brown, Eliza Ann Sutherland, Samuel Connely, Israel D. Haines, Robert Haines, Samuel Haines, John W. Haines, Cynthia Ann Connely, widow of John Connely, deceased; Nancy Stratton, Martha Jane Stratton, Sarah E. Stratton, Williamson Stratton, Robert A. Stratton, Samuel C. Stratton, John H. Baird, John S. Hager, Benjamin Smith, Eugene L. Sullivan, Ogden Hoffman, John R. Sharpstein, Clinton A. Edson, James D. Whitney, Narissa C. Whitney, Wm. C. Watson, Harley Y. Ludington, C. Bonner, Mrs. Allison Bowers, The City and County of San Francisco, John Doe, Richard Roe, James Doe, Richard Doe, John Styles, Richard Styles, John Doe second, Richard Roe second, James Doe second, Richard Doe second, John Styles second, Richard Styles second,

Defendants in error.

No. 141.

Error to the Supreme Court of California

BRIEF FOR THE DEFENDANTS IN ERROR.

The plaintiff in error was the plaintiff in the Court below. He sought the enforcement of an alleged trust, whose subject is a tract of land in San Francisco. When the case was called for trial in the District Court, the plaintiff's counsel having stated to the Court the facts he proposed to establish, the defendants' counsel moved for a non-suit, which, being granted, the plaintiff appealed to the Supreme Court of California, by which tribunal the judgment of non-suit was affirmed. And the plaintiff brings the case here by writ of error.

It will be observed that the plaintiff in error appealed to the Supreme Court of California, not only from the judgment of non-suit, but from the refusal of the District Court to grant him a new trial, and that this refusal was affirmed by the appellate Court. (Rec., p. 46.) But this refusal cannot be assigned as error in this Court, as has long since been settled.

In *Marine Ins. Co.* vs. *Young*, 5 Cranch, 187, it was said it would be "improper in this Court "to determine whether the inferior Court ought "or ought not to have granted a new trial upon "the ground that the verdict was contrary to "evidence."

And in *Marine Insurance Co.* vs. *Hodgson*, 6 Cranch, 218:

"It may be very hard not to grant a new trial "or not to continue a cause; but in neither case "can the party be relieved by a writ of error."

Again, in *Burr* vs. *Gratz*, 4 Wheaton, 220, Justice Story being the organ of the Court:

"The first error assigned is that the Court "refused to grant a new trial. But it has been "already decided, and is too plain for argument, "that such a refusal affords no ground for a writ "of error."

This branch of the case may therefore be considered as disposed of.

Statement of the Facts.

On the 8th day of March, A. D. 1866, the United States, being the holder of the legal title to the demanded premises, Congress passed an Act conveying them to the City of San Francisco, directing that they should be disposed of to the parties in the *bona fide* actual possession thereof, by themselves or their tenants, in such terms and upon such conditions as should be prescribed by he Legislature of California.

Stat. at Large, Vol. XIV, p. 4.

On January 14th, A. D. 1868, the Board of Supervisors of the city of San Francisco passed an

ordinance called "Order 800," providing means for the execution of this trust.

See plaintiff's bill of exceptions, Rec., p. 36, *et seq.*

On March 27th, A. D. 1868, the Legislature of California passed an Act confirmatory of this order, and prescribing the terms and conditions mentioned in the Act of Congress.

Session Acts of 1867–8, p. 379, and another Act to the same end, on March 25th, 1870.
Session Acts of 1869–70, p. 353.

On January 15, A. D. 1870, D. W. Connolly presented to the Board of Supervisors of San Francisco, pursuant to the various acts recited, his petition, praying for a grant of the premises in controversy, and in due time, received it.

Rec. pp. 40-41.

Prior to the passage of the act of Congress of 1866, to wit: on May 11, A. D. 1863, the defendants, Baird, Hager, Sullivan, together with their tenants in common, Smith, Roberts and Walker, were in the actual *bona fide* possession of said premises, claiming the same in their own right and adversely to all others, when Daniel Sweeny, C. P. Duane, W. G. Ross and J. A. Kelly and their confederates unlawfully entered in and upon said premises and ejected and ousted therefrom the lawful possessors aforesaid, who instituted in

the District Court of the Fourth Judicial District, in and for the County of San Francisco, against said intruders a suit for the recovery of said premises, and on April 6, A. D. 1867, recovered judgment, which, on appeal by said intruders to the Supreme Court of California, was, at the April term, A. D. 1869, in all things affirmed. And a writ of restitution having issued thereupon, the said intruders were by the Sheriff of the City and County of San Francisco ejected from said premises, and they, said defendants, reinstated in their possession. (Rec., p. 40.) And they afterward, and prior to the presentation of the petition by said Connolly and for purposes of convenience, conveyed to him their interests in said lands.

Shortly after the unlawful entry and ouster mentioned, said Sweeny applied for the benefit of the pre-emption laws, and prior to the institution of this suit, he conveyed his pretended rights to the plaintiff in error, who, upon this state of facts, charges that, in obtaining the city's title, Connolly became Sweeny's trustee, and that therefore, the plaintiff in error is entitled to a deed of conveyance from the heirs and representatives of Connolly, who died prior to the institution of this suit, the defendant J. H. Baird being executor of his will.

POINT I.

The writ of error should be dismissed, as the Court has no jurisdiction, there being no federal question involved.

Both parties claim under the act of Congress of 1866. The Judiciary Act of 1789 has been modified by the act of February 14, 1867, by this language: "But no other error shall be assigned or "regarded as a ground of reversal in any such "case as aforesaid than such as appears on the "face of the record, and immediately respects the "before mentioned questions of the validity or "construction of said Constitution, treaties, stat-"utes, commissions or authorities in dispute."

The record presents no question of the validity or the construction of the act of the 8th of March, A. D. 1866. The plaintiff in error makes no complaint that involves a consideration of the federal law. His pretended grievance is, that having, by the Order 800 and the laws of California, become a ~~trustee~~ cestuique trust, the Courts of the State have denied him that character. Even if his complaint were well founded, obviously this Court can afford him no relief.

POINT II.

Nothing in the record establishes a trust. There is no allegation of privity or of any relation of confidence between the parties.

By the bill of exceptions it plainly appears that Sweeny and his confederates were guilty of an unlawful ouster, as they were turned out of possession by the judgment of a Court.

Rec., p. 40.

The Act of the Legislature required as a condition precedent to obtaining the city's deed, the payment of taxes.

Sweeny paid none; Connolly paid all. No application for a deed was ever made by Sweeny to the city. He has never been in possession since the day of his expulsion by the Sheriff. Connolly, on the contrary, was in possession on the day of his application to the city, and he and his predecessors having been, from a date prior to Sweeny's unlawful ouster, the law regards such possession as having been continuous. It is deemed to have suffered no interregnum.

"If one disseises me, and, during the disseisin "he cuts down the trees or grass, or the corn "growing upon the land, and, afterward, I re-"enter, I shall have an action of trespass against "him, *vi et armis*, for the trees, grass, corn, etc., "for the law, as to the disseisor and his servants, "supposes the freehold always continued in me."

Richard Lifford's Case, 11 Rep., p. 51.
See, also, *Holcombe* vs. *Rawlins*, Cro. Eliz., p. 540.

POINT III.

Sweeny was estopped to hold Connelly as his trustee, having failed to present an adverse claim.

By the provisions of the Act of the Legislature of California, of March 24th, A. D. 1870, Sec. 3,

p. 354, Sweeny was empowered to arrest the delivery of the deed to Connolly. It was only necessary to institute a suit against him to determine their respective claims, and to file a copy of the complaint with the clerk of the Board of Supervisors. No matter how long the litigation might have lasted, Connolly could have obtained no deed until Sweeny should have had every opportunity afforded by the law for the vindication of his pretenses. Having instituted no such suit, he must be held to have abandoned any claim to the demanded premises in rivalry with that of Connelly. His remedy was pointed out by the statute, and he must be held to have been restricted to *that*. This section of the Act was considered in *Randal* vs. *Austin*, 46 Cal., 54. And in *Dupont* vs. *Barstow*, 45 Cal., 454, it was said of a party in a condition somewhat similar to that of Sweeny:

"The plaintiff was not, and is not, now entitled "to a conveyance of the legal title, nor did he "acquire it by virtue of the Order No. 800, and "the Act which ratified it. Whatever rights he "might, otherwise, have asserted, he lost by his "failure to pay the taxes and assessments."

POINT IV.

The judgment by which Sweeny and his confederates were expelled from these lands is conclusive upon the character of his possession.

The Bill of Exceptions (Rec., p. 40, par. VII) states that the plaintiff in error proposed to prove that Sweeny was in the *bona fide* possession of these lands at the date of the passage of the Act of Congress of March 8, A. D. 1866. But the bill afterward shows a state of facts which rendered it impossible to make any such proof, For it is said :

1st. That Sweeny went into possession as a pre-emptor, and afterward, applied for the benefit of the pre-emption laws ; and

2d. He was ousted by the judgment of a Court.

Now, by the provisions of the pre-emption laws, lands within the limits of a city are expressly exempted from their operation ; and, a judgment ousting a party whose only pretence of title is possession, fixes upon him the *status* of a trespasser.

This judgment characterized the possession of Sweeny as acquired in *bad faith*, and must, upon that point, be deemed to be conclusive.

Eyers vs. *Neal*, 43 Cal., 210.

Besides, the language of the Order No. 800 provides that persons ousted from these lands at a date prior to its passage, and who have recovered possession by legal proceedings, shall be entitled to the benefit of the act of Congress of March 8, 1866.

To Conclude.

As between Sweeny and Connolly there was no act of confidence, and, therefore, no privity of estate. Nothing in the record shows that either ever knew or heard of the existence of the other.

As between Sweeny and those of the defendants in error whose possession he invaded, and who successfully pursued him in the Courts of the State as a spoliator, none but relations of hostility ever existed. These defendants knew him and his associates only as members of the criminal class known as "Land robbers," and perturbators of the peace, and, therefore, dealt with them at arms' length.

The predicament of the plaintiff in error may be likened to the case of A who purloins a jewel belonging to B, who, having recovered his property by proceedings at law, A goes into equity, charges B as his trustee, and demands a decree for the return of the jewel, because he had once had *possession* of it.

Edmond L. Goold,
Of Counsel.

Supreme Court of the United States.

No. 141.

WILLIAM TRENOUTH, PLAINTIFF IN ERROR,

vs.

CITY AND COUNTY OF SAN FRANCISCO, JOHN H. BARID ET AL.

AUTHORITIES FOR DEFENDANT IN ERROR.

Wiliam A. Shaffer, Plaintiff in Error, *vs.* James A. Scudday, (19 Howard, 16):

Syllabus.

"In 1841, Congress granted to the State of Louisiana 500,000 acres of land, for the purposes of internal improvement, and in 1849 granted also the whole of the swamp and overflowed lands which may be found unfit for cultivating.

"In both cases patents were to be issued to individuals under State authority.

"In a case of conflict between two claimants, under patents granted by the State of Louisiana, this Court has no jurisdiction, under the 25th section of the judiciary act, to review the judgment of the supreme court of Louisiana, given in favor of one of the claimants."

Point.

The Court has not jurisdiction of the present writ of error.

Defendant in error holds a title granted by the City and County of San Francisco. The United States granted the lands to the city and county, just as in the above case the land was granted to the State of Louisiana. The plaintiff in error holds no title at all from the City and County of San Francisco, the grantee of the United States. If he had he would have no more justification for attempting to thrust jurisdiction upon this Court than had Shaffer in the case in 15 Howard. As it is, his lack of justification is still more plain. Plaintiff in error claims that the City and County gave the title to the wrong party. Suppose that were so, the error did not re-vest the title in the United States, nor does the grantee of the City and County hold under the United States; and if the defendant in error were, in equity, trustee of the title for the plaintiff in error, such title would not be a title from the United States, or claimed under the United States, but a title held and claimed under the City and County of San Francisco.

If the Court has jurisdiction, plaintiff in error is estopped from asserting a right to the title. His claim must be that the city and county ought to have made a deed to him, because his predecessor was in possession at the date of the act of Congress which granted the land to the city and county, with a condition that the lands should be deeded to those who should be in the "*bona fide* actual possession" at the date of the act. The words "*bona fide* possession," must mean a lawful possession—a possession coupled with a right of possession as against any individual. The judgment in the ejectment action is conclusive that at the date of filing the complaint therein the plaintiff therein was entitled to the possession, and that therefore the possession of the defendant in the action was unlawful and not *bona fide*. The complaint in the ejectment was filed before the date of the act of Congress, and the judgment was executed subsequent to that date. (Rec., 40.)

It would be to no purpose for plaintiff in error to show that the land ought not to have been deeded to the defendant in error, unless he can show at the same time that it ought to have been deeded to himself. He can only obtain the decree he asks for upon the strength of his own right.

We cite certain opinions of the supreme court of California to the point that the judgment in ejectment estops the plaintiff in error from pretending that his possession, at the date of the act of Congress, was a "*bona fide* possession," as the act in terms provides shall be the case with those who are to have the benefit of the trust declared in the act.

41 Cal., 41:

"A judgment in ejectment does not transfer to the prevailing party the title of the adverse party, but it awards to the successful party the possession, because the opposite party had no title to the land in controversy, and estops him and those claiming under him from setting up or offering proof of title to the land recovered as against the successful party or his privies in estate." (Mahoney *vs.* Middleton, 41 Cal., 41.)

Marhall *vs.* Shafter, 32 Cal., 176:

"If the respective titles of the parties or their right to the possession of the demanded premises are put in issue and tried in ejectment, and the plaintiff recovers judgment for possession, the judgment is an estoppel, and the defendant, to avoid the estoppel in a subsequent action to recover the same premises, must show some other right of possession than he had when the judgment was rendered.

"The fact that a judgment in ejectment is not that plaintiff recover the title, but only that he recover the possession, does not prevent the judgment from being an estoppel as to whatever rights the parties respectively possessed."

Owen *vs.* Fowler, 24 Cal., 192; Owen *vs.* Morton, 24, Cal., 373:

"Plaintiff [in ejectment] must show a *right to the possession in himself*, and a possession in the defendant *at the time the action is brought;* and if he fails to establish either proposition, he cannot recover."

Respectfully submitted,

EDWARD JANIN,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 141.—October Term, 1879.

William Trenouth, Plaintiff in Error,

vs.

The City and County of San Francisco, John H. Baird, Ex'r, etc., et al.

Error to the Supreme Court of the State of California.

BRIEF OF S. M. WILSON,

Of Counsel for Defendants.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

No. 141.—October Term, 1879.

William Trenouth, Plaintiff in Error, *vs.* The City and County of San Francisco, John H. Baird, Ex'r., etc., et al.	Error to the Supreme Court of the State of California.

Brief of S. M. Wilson, of Counsel for Defendant in Error.

General Facts.

This was a bill in equity, filed in one of the District Courts of California, to obtain a decree declaring the defendants to be trustees of the plaintiff, and that they be adjudged to hold the land described in the complaint in trust for plaintiff, and be decreed to convey the same to him, and to deliver the possession. The lands are situated in the city and county of San Francisco, and are what are called outside lands, being a part of the lands granted to the city, under the Act of Congress of March 8th, 1866.

14 U. S. Stat. at Large, p. 4.

On the cause being called for trial, the plaintiff's attorneys made a full statement of the facts which they expected to prove, and upon which they asked the decree of the Court in favor of the plaintiff.—(Fols. 84, et seq.) Upon

the conclusion of the statement, the defendants' counsel moved a non-suit and dismissal upon grounds fully stated (fols. 101, et seq.), which was granted. The plaintiff moved for a new trial; the motion was denied, and an appeal was taken as well from the judgment as from the order denying a new trial, to the Supreme Court of the State. That Court affirmed the judgment of the Court below.

The bill of exceptions contains the statement of the plaintiff's counsel, and we now chronologically state the case as proposed to be proved on the part of the plaintiff.

On the 11th of September, 1865, some of the defendants and the grantors of the other defendants commenced an action of ejectment, in the Fourth District Court in and for the City and County of San Francisco, against Daniel Sweeney (the plaintiff's subsequent grantee) and others to recover the land in controversy, then in possession of said Sweeney and his associates.

On the 6th of April, 1867, the plaintiffs in that action recovered judgment against Sweeney and his associates for the land. An appeal was taken to the Supreme Court of California, and the judgment of the District Court affirmed at the April Term, 1869. The title of the cause is *Baird et al.* vs. *Duane et al.* (No. 1872.)

On the 3d of September, 1869, a writ of restitution was issued out of the District Court, and was executed on the 4th of September, 1869, by ousting Sweeney and his associates, and placing Baird and the grantors of the present defendants in possession.

Afterwards the title of the successful parties in that action was for their own convenience concentrated in Mr. David W. Connelly, and he, on the 15th of January, 1870, presented his petition to the Board of Supervisors of San Francisco for a grant of the land under the Acts of Congress and of the Legislature and the City Ordinances. Mr. Connelly paid all the taxes and assessments required by law, and on due proceedings had all of the tract of land, not reserved, was granted to him, and a deed by the city authorities exe-

cuted to him. The present defendants are now in possession, holding deeds from Mr. Connelly, except certain devisees of his, who claim under his last will and testament, he having died since the execution of the city deed, and before this action was brought.

The plaintiff in this action has, since Sweeney's expulsion from the land, obtained his conveyance, and has no other right or claim than he derives from Sweeney.

Neither the plaintiff nor Sweeney paid the city taxes or assessments, or petitioned the city authorities for a grant of the land, nor was any opposition made to the application of Mr. Connelly.

Between the plaintiff and his grantor, Sweeney, on the one side, and the defendants and their grantors on the other, there never were any relations of trust or confidence whatever; but on the side of the plaintiff there was a wrong; on the other side, adverse legal proceedings to remedy the wrong.

The Plaintiff's Case Stated in Short.

A trespasser ousted from land by due legal process claims that the injured party holds the land recovered in trust for the trespasser, and that the legal title granted to the innocent and injured party inures to the benefit of the trespasser.

The trespasser asks the aid of a Court of Equity against the men he has injured, presenting his own outrages as the basis of equitable interference.

Points and Authorities.

I.

The Act of Congress of March 8, 1866, made a grant to the city of land to be disposed of and conveyed to parties in the *bona fide* actual possession, by themselves or tenants, on the passage of the Act, in such quantities, and terms, and conditions as the Legislature of the State of California might prescribe, excepting land reserved, etc.

14 U. S. Stat. at Large, p. 4.

II.

The Act of the Legislature of March 27, 1868, confirming Order 800, prescribed the terms and conditions.

Stat. 1867–8, p. 379.

III.

Sweeney did not comply with the terms and conditions of that Act, and did not become a beneficiary.

Dupond vs. Barstow, 45 Cal., 453.

IV.

The case of Baird et al. vs. Duane et al., April Term, 1869 (No. 1,872), determined the question of *bona fides*, and covers every defence made, or that could have been made.

Leroy vs. Cunningham, 44 Cal., 607.

Iburg vs. Suanet, 47 Ib., 269.

Byers vs. Neal, 43 Ib., 214–16.

Freeman on Judgments, 210 to 219, 223 to 240, 273.

V.

The proceedings of Connelly were rightly taken under the Act of 24th March, 1870 (wrongly printed in the Statute as 14th March).

Stat. 1866–70, p. 253.

VI.

If Sweeney, or the plaintiff, desired to contest Connelly's right to the deed from the city, he should have commenced his suit, and then filed a copy of his complaint with the Board of Supervisors, and paid his taxes and assessments. Then the deed would have been withheld, to abide the result of the action.

Randall vs. Austin, 46 Cal., 59.

Stat. 1869–70, p. 353.

VII.

But the case of Baird et al. vs. Duane et al. (supra) had already determined the question of right as between the parties.

VIII.

The deed from the city was conclusive as to the rights of the defendants, and the plaintiff was not entitled to a deed, and was in no condition to question the regularity of the proceedings by which the deed to Connelly was obtained.

Dupond vs. Barstow, 45 Cal., 451.
Leroy vs. Cunningham, 44 Cal., 600.
Low vs. Lewis, 46 Cal., 549.
Stark vs. Barrett, 15 Cal., 363.
Van Hastings vs. Madison City, 1 Wall., 297.
People vs. Stratton, 25 Cal., 242.
Terry vs. Megerle, 24 Id., 629.
Doll vs. Medor, 16 Id., 324 to 321.
Rhodes vs. Craig, 21 Id., 430.
Kite vs. Tubbs, 23 Id., 437.
S. C., 32 Id., 338.
Bissell vs. St. Louis P. Schools, 16 Mo., 582.
Macklot vs. Dubrieuil, 9 Id., 489.
Boyce vs. Papin, 11 Id., 24.
Allen vs. Blunt, 3 Story C. C. R., 724.

IX.

The possession of Sweeney on the 8th day of March, 1866, must be held to be the possession of the grantors of the defendants, and to avail for their benefit. Though Sweeney had disseized the grantors of the defendants, yet, as they regained possession in the action of ejectment, the law, after the re-entry, regards the freehold and possession all along to have continued in the grantors of the defendants.

Dewey vs. Osborn (4 Cowen, 338), and the cases there cited.

X.

By the very terms of Order 800, confirmed by the Legislature, the defendants, grantors, having been ousted by Sweeney before the 8th day of March, 1866, and having, since that day, recovered the premises by legal process, became entitled to the grant from the city.

Stat. 1867–8, p. 381, Sec. 11.

Reliance is also placed on the other points of associate counsel, as set forth in their briefs.

S. M. WILSON, *of Counsel.*